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In The

Supreme Court of the United States

October Term, 1988

THE JIMMY SWAGGART MINISTRIES,

Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA

On Appeal From The Court Of Appeal, State Of California Fourth Appellate District, Division One

BRIEF FOR THE APPELLANT

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QUESTIONS PRESENTED

1. Whether the State of California may treat occasional religious worship services conducted in the State as a "nexus" for imposition of use tax collection liability on a religious ministry located in another state for "sales" made through the mails to adherents in California.

2. Whether the State may impose sales and use tax on the noncommercial distribution of religious materials by a religious ministry to its adherents for the purpose of advancing its religious doctrine.

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BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the Court of Appeal (J.S. App. A1-A40), as modified (J.S. App. A41), is reported at 204 Cal. App. 3d 1269.

JURISDICTION

The opinion and judgment of the Court of Appeal was entered on August 29, 1988 (J.S. App. A1-A40), and the petition for rehearing was denied on September 28, 1988 (J.S. App. A41). The Supreme Court of California denied the petition for review on November 17, 1988 (J.S. App. A42). A notice of appeal was filed on February 9, 1989 (J.S. App. A43-A44). The jurisdictional statement

was filed on February 15, 1989, and the Court noted probable jurisdiction of the appeal on April 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the California Revenue and Taxation Code are set forth at J.S. App. G1-G5.

STATEMENT

Appellant, the Jimmy Swaggart Ministries,[1] is an evangelistic ministry headquartered in Baton Rouge, Louisiana. It is recognized as a religious organization under both state and federal law and is exempt from taxation on its income and property, and from inheritance and gift taxes. Tr. 26, 102-03; J.A. 11, 18-19. Its bylaws and constitution explain that the organization "is called for the purpose of establishing and maintaining an evangelistic outreach for the worship of Almighty God" and is committed to "propagating the gospel of Jesus Christ by all available means." According to the bylaws, these means "specifically include" evangelistic crusades, radio and television broadcasting, audio production and reproduction of music and preaching, writing, printing, publishing, and "any and all other individual or mass media methods that presently exist or may be devised in the future to proclaim the good news of Jesus Christ." J.A. 104-05.

This case involves appellant's purported obligation to pay sales tax on the distribution of religious materials

[1] Formerly known as the "Jimmy Swaggart Evangelistic Association," appellant changed its name to "The Jimmy Swaggart Ministries" on July 21, 1982. J.A. 57.

at religious services held within the State of California and to collect and remit use tax on the distribution of similar materials through the mails to its adherents in California, during the tax years 1974-81.

1. The materials in question are part of the record in this case and are available for inspection by the Court. They consist of Bibles (Exhs. 24, 33, 34), Bible study manuals (Exh. 26), printed sermons and collections of sermons (Exh. 36), audiocassette tapes of sermons (Exhs. 28, 29, 30), religious books and pamphlets, including the "Life Changing Prayer Manual" (Exh. 23), "What Does the Bible Say?" (Exh. 40), a welcome to new believers called "There's a New Name Written Down in Glory" (Exh. 17), and a discussion of war, famine, and other disasters, entitled "Is God Guilty?" (Exh. 40), and religious music in the form of songbooks, tapes, and records (Exhs. 31, 32, 37). All of these materials were prepared and produced by appellant for purposes of its ministry.

It is undisputed that all of the materials at issue in this case are directly related to religious worship or the conveyance of religious doctrine. During the tax years in question, appellant also distributed a small quantity of additional items, including mugs, t-shirts, and the like (J.S. App. A3-A4 n.3), but appellant has paid, and has not contested, the tax on these items, since they "do not have specific religious-message content" (*id.*).[2]

The record shows that appellant distributes the religious materials under dispute for the express purpose of disseminating religious doctrine, and not for commercial advantage. J.A. 102-03, Tr. 85. The Rev. James E. Rentz, an

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[2] While there was no formal calculation for purposes of this proceeding (J.A. 105, Tr. 90), appellant's best estimate of the total sales value of the nonexempt items over the eight-year period in California was $4,901, producing a tax of about $300. See appellant's Exhibit B in the reply brief before the Court of Appeal.

ordained Assemblies of God minister in charge of appellant's evangelistic crusades, testified that it is "vital that we are able to utilize these tools to fulfill what we're taught to do as ministers of the gospel" (J.A. 96. Tr. 65). As to each "representative" item admitted into evidence at trial (see J.A. 92-93, Tr. 62), the witness explained how it was related to the dissemination of religious doctrine and stated that these methods are comparable in purpose and effectiveness to more traditional forms of ministry, such as preaching and door-to-door evangelism (Tr. 67-71). As he explained, "that's the way we are spreading the gospel today, not just from the pulpit, but through other means." J.A. 66, Tr. 20. In short, appellant does not distribute these materials to make money to support its religious ministry; distribution of these materials is itself a "vital part" of its ministry. J.A. 91, Tr. 58.

These religious books and materials are made available to adherents on various terms. As is typical in the Assemblies of God denomination (in common with other religious traditions), adherents are asked to make a payment whenever possible, so that appellant "could produce other materials" (J.A. 67, Tr. 20). Both payments and donations were used entirely for appellant's religious ministry. J.A. 146, Tr. 149. Sometimes individuals send in a "order form" with a set price for a specified item. Sometimes they send in a donation and receive an item – either specified or unspecified – in return. Sometimes they receive an item without paying or giving anything. J.A. 54; J.A. 166, Tr. 169-71. See J.A. 51 ("It is the policy of [appellant] to distribute religious materials notwithstanding that the person requesting the item may not remit the stated price."). Appellant's auditor, a specialist in the taxation of nonprofit organizations, testified that "you can't distinguish between sales and contributions that have a sale or a premium involved." J.A. 160, Tr. 164; see also J.A. 161, 165-172, Tr. 165, 168-74.

2. Two related state taxes, the sales tax and the use tax, are involved in this case. The sales tax is defined by

statute as a tax on "the privilege of selling tangible personal property at retail." Cal. Rev. & Tax. Code § 6051, J.S. App. G2. The sales tax is levied on sales that take place within the State. The use tax is imposed on "[e]very person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer." *Id.*, § 6202, J.S. App. G3-G4. The use tax is called a "double filter," since it is generally imposed in cases where the retail sale was outside the jurisdiction and therefore not taxable. California law imposes a duty on the seller in most cases to collect the use tax. *Id.*, § 6203, J.S. App. G4.

The use tax collection liability in this case – 88 per cent of the total tax assessed against appellant – is based on the distribution of materials through the mails, from appellant's headquarters in Louisiana to its adherents in California. Under the Commerce and Due Process Clauses, a state may not impose use tax collection liability on an out-of-state distributor unless that distributor has a sufficient "nexus" to the state. *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 554 (1977).

Appellant owns no property in California and maintains no office or regular presence in the state. Appellant does, however, conduct occasional evangelistic crusades in California and other states. These "crusades" are worship services, featuring preaching, prayer, and religious music, along with incidental "sales" of sermon tapes, Bibles, religious literature, and religious music before and after the worship services. No part of the cost of these meetings is paid by the state; indeed, in addition to the rental of the meeting halls, appellant pays the entire cost of police, fire and other necessary public services during the crusades.[3] In addition, appellant and its staff pay

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[3] In California, as elsewhere, the terms for rental of public auditoriums are set by law, usually in the form of a municipal

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taxes on their purchases of goods and services while in the state. During 1974-81, appellant conducted 23 evangelistic crusades in California, on average three per year. These crusades lasted one to three days, with one crusade lasting six days. J.S. App. A3. During three of the eight tax years – 21 of the 28 tax quarters for which there was evidence – appellant conducted *no* crusades in California at all.

In addition to the crusades, for three of the eight tax years, appellant "had a full-time representative in California counseling adherents" (J.S. App. A34). It is undisputed that this "representative" – an ordained minister – engaged in purely religious, noncommercial activity (mostly counseling and solicitation of contributions) and had no connection with the so-called "sales" at issue in

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ordinance. Although details vary, standard terms require the renter to pay for police, fire, first aid, custodial, insurance, and other public services. For examples from cities in which appellant conducted evangelistic crusades, see City of Anaheim Res. No. 89R-1 (Jan. 10, 1989) (approving standard form contract providing that the City will supply, "at Tenant's cost and expense," *inter alia*, "additional custodians and custodial services, guards, watchmen, personnel to staff first-aid facilities, ushers, groundscrew, City of Anaheim police officers, and firemen"); City of Bakersfield Municipal Code § 2.52.320 (1982) (adopted Aug. 1, 1960, Ordinance No. 1313, § 23(i)) ("[e]very permittee shall furnish or pay for such police and fire protection as may be required"); City of Stockton Rules and Regulations Governing the Use of Civic Auditorium, Res. No. 28,296 (renter must agree "to hold the City of Stockton . . . free and harmless from any . . . cost or expense that may arise during or be caused in any way by use of the equipment or facility"); *id.*, § 19 (renter must "employ at his expense sufficient police protection for any event as in the opinion of the Auditorium Manager and/or the Chief of Police is required to protect life and property . . . ").

this case. At no time did the Board rely on the activities of this religious counselor as a nexus for taxation, either alone or in combination with the crusades.[4]

The sales tax liability in this case – 12 per cent of the total at issue – was imposed on the distribution of religious materials during the evangelistic crusades immediately before and after the worship services. The materials distributed at the crusades are identical to materials distributed through the mails.

3. During the tax years 1974-81, appellant neither collected nor paid sales or use taxes on the religious materials at issue in this case, having been advised by counsel that such taxes would be unconstitutional (J.A.

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[4] The Board of Equalization first notified appellant of its conclusion that there was sufficient nexus to require use tax collection in a letter to appellant's general counsel, dated July 14, 1981 (reprinted at J.S. App. F3-F4). The letter stated that the Board's "Legal staff" had "concluded that, on the basis of the crusades held in California, your client has a substantial presence in the State which permits the State of California to constitutionally impose on your client the duty to collect the use tax from its mail-order purchasers." J.S. App. F4. The letter made no mention of the clergyman-counsellor. The next occasion for the Board to address the nexus issue was in its Decision and Recommendation on appellant's petition for redetermination, dated April 4, 1983 (reprinted at J.A. 17-29). That Decision made note of the fact that appellant "maintains a representative in Modesto, California" (J.A. 21), but unambiguously held that nexus had been found "on the basis of the crusades held in California." J.A. 22. Subsequent rulings of the Board were perfunctory and did not explain the basis for their conclusions. See J.A. 31 (staff analysis); J.A. 32-33 (Notice of Redetermination); J.A. 35-36 (Notice of Denial of Claim for Refund). In its original August 29, 1988 opinion, the Court of Appeal observed that "[f]rom 1978 to 1981, Ministries had a full-time representative in California counseling adherents" (J.S. App. A36), but this section of the opinion was deleted by order of the court dated September 28, 1988 (J.S. App. A41).

55). Appellant relied, in part, on a formal opinion by the Attorney General of the State of California, dated January 31, 1980, which concluded that it would be unconstitutional to tax the sales of materials by church-related schools to their students. *Opinion of the Attorney General*, No. 79-524 (Jan. 31, 1980), see J.A. 14-15.

In 1981, appellee investigated appellant's activities and concluded that appellant is liable to register with the Board of Equalization and to pay sales and use taxes on the distribution of religious materials to adherents in California (J.S. App. A5). As part of that investigation, appellee sent agents to observe appellant's evangelistic crusade in Long Beach and report back to the Board. J.S. App. F3. On May 22, 1980, an official of the Board wrote a hand-written note to counsel for appellant, stating (Exh. 47, J.S. App. E1-E2):

> We must have an immediate response sending the completed applications registering your organization for its past and future sales activities in this state. Any California sales at this time are strictly illegal and the officers of the organization are guilty of a misdemeanor.
>
> /s/ B.L. Lamb

Appellant cooperated with appellee's auditors to determine the amount of the supposed tax liability, making its records available and requesting its outside auditor to work with the Board. J.S. App. A5; J.A. 58, ¶ 4. It was not possible to determine the precise amount of use tax liability (J.A. 151, Tr. 157), mainly because sales and donations to the ministry could not be disaggregated (J.A. 171, Tr. 173). In order to proceed with this case, the parties stipulated that appellant "sold for use in California tangible personal property for the period April 1, 1974, through December 31, 1981, measured by payment to [appellant] of $1,702,942.00 for mail order sales from Baton Rouge, Louisiana and $240,560.00 for crusade

merchandise sales in California" (J.S. App. A5).[5] On the basis of these approximated figures, appellant was said to owe sales and use taxes of $118,294.54, plus interest of $36,021.11 and a penalty of $11,829.45, for a total of $166,145.10.

On May 3, 1982, appellant filed a petition for redetermination with the Board (J.A. 11-16). Following a hearing before a hearing officer and review by the Board, the Board remitted the penalty but otherwise affirmed the finding of liability. J.A. 32-33. Pursuant to Cal. Rev. & Tax. Code § 6902, appellant paid the tax and filed a claim for refund before the Board. J.A. 34. Following denial of the claim for refund (J.A. 35-36), appellant filed an action in Superior Court challenging the constitutionality of the tax. J.A. 37-41. The case was tried in Superior Court on May 6-7, 1986, and that court entered judgment for appellee on November 7, 1986. J.A. 215-216.

Appellant appealed to the Court of Appeal, raising a number of constitutional and statutory grounds. That

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[5] This figure was determined through negotiation between appellant's auditor and the state auditor, based on "a formula, if you will, on what potential sales and donations to California *might have been*." J.A. 148, Tr. 153 (testimony of auditor James E. Guinn) (emphasis added). The figure was based on informal, unaudited estimates of total national revenue, used for broadcast planning. From these totals were subtracted "pure donations" – about 70 per cent of the total. This left a figure for revenues generated from the distribution of religious materials. But since purchase price and donations are often intermingled (see J.A. 165-69, Tr. 169-171), it was not possible to separate out the two. Accordingly, the stipulated tax was based on "potential sales" – revenues that *could have* been a purchase price. The California portion of these national "potential sales" was then estimated on the basis of Arbitron ratings, which show that 4.39 per cent of appellant's national audience resides in California. The auditor's testimony about this process is found at J.A. 149-52, Tr. 156-57.

court rejected appellant's arguments under the Free Exercise and Establishment Clauses (J.S. App. A7-A29). The court expressly held that appellant's mode of first amendment expression, like that in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), and *Follett* v. *McCormick*, 321 U.S. 573 (1944), is "entitled to 'as high a claim to constitutional protection as the more orthodox types' of spreading one's religious beliefs." J.S. App. A10-A11, quoting *Murdock*, 319 U.S. at 110. The court found that "there is no significant difference between hand distribution and mail distribution or between printed matter and recorded religious matter." *Id.* at A10. Nonetheless, the court distinguished *Murdock* and *Follett*, confining the principle of those decisions to "a particular type of tax, a flat license tax which was unrelated to receipts, income or the administrative costs of a regulatory scheme and which acted as a prior restraint on the exercise of a constitutional right." *Id.* at A11.

In rejecting appellant's claim that administration of California's use tax would create the danger of an excessive entanglement between religious and governmental authorities, the Court of Appeal noted that the testimony in the case "tends to support [appellant's] position." J.S. App. A28. However, the court stated that "the trial court was not required to accept [the testimony]" (*id.* at A28) and concluded that "[n]either [appellant's] difficulty in establishing past 'sales' from its books due to its past accounting practices nor the requirement of future recordkeeping involve the government with an excessive entanglement with religion so as to violate the Establishment Clause" (*id.* at A29).

The Court of Appeal rejected appellant's other contentions, holding that appellant had failed to comply with the procedural prerequisites for challenging the tax under the Commerce Clause (*id.* at A30-A33), and, in its original opinion, rejecting appellant's Commerce Clause claim on the merits (*id.* at A33-A37). The Court of Appeal subsequently deleted this latter holding (*id.* at A41), leaving

only the procedural ground for its rejection of the Commerce Clause argument. The court also rejected appellant's arguments under the Ninth and Tenth Amendments to the Constitution (*id.* at A37-A39). The court observed that these claims were not raised in the claim for refund (J.S. App. A37 n.20), but nonetheless reached the merits. The court also rejected various state law claims (*id.* at A33-35, A39-A40).

Appellant petitioned for review in the Supreme Court of California, but the petition was denied. J.S. App. A42. This appeal followed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Itinerant preachers and evangelists have long been the focus of conflict between the powers of the states and the free exercise of religion. In the struggle for religious freedom in the thirteen original states, the licensing, restriction, and regulation of itinerant preachers was (along with religious assessments) the most pressing issue that demanded constitutional reform. Itinerant preachers were condemned, often with good reason, for being arrogant, fanatical, intolerant, uneducated, and mercenary.[6] States passed laws restricting preaching to designated pulpits, licensing and registering preachers, and regulating the qualifications and decorum of preachers.[7] James Davenport, a fiery preacher from

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[6] See generally S. Ahlstrom, *A Religious History of the American People* 283-87 (1972).

[7] See T. Curry, *The First Freedoms* (1986), at 69-70 (New York), 99 (Virginia), 118 (Connecticut), 171 (Massachusetts); S. Cobb, *The Rise of Religious Liberty in America* (1902), at 126 (North Carolina), 174, 202-03 (Massachusetts), 273 (Connecticut), 317-18, 334-35, 344, 349-53 (New York), 390-94 (Maryland).

Connecticut, was arrested for violating the law against itinerant preaching, tried by the colonial legislature, adjudged mentally disturbed, and deported under guard to Long Island.[8] A Virginia prosecutor charged a group of Baptist ministers in these words: "May it please your worship, these men are great disturbers of the peace: they cannot meet a man upon the road, but they must ram a text of scripture down his throat."[9]

With the end of establishment and the adoption of free exercise provisions in the various state constitutions, however, the right to proclaim the gospel in unconventional, unsettling, and unpopular ways became recognized as one of the most fundamental elements of religious freedom.

A new wave of controversy arose in the 1930s and 1940s, as communities in many parts of the nation flexed their regulatory and taxing powers to ward off the new menace of Jehovah's Witnesses and other religious interlopers. As in the late colonial period, the Witnesses were said, often with reason, to be "provocative, abusive, and ill-mannered," not to mention "unpopular, annoying, or distasteful." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115-16 (1943); see *id.* at 166-82 (Jackson, J., dissenting). Itinerants were particularly vulnerable, since they have no established base of support in the community, may be perceived as alien or disruptive, and often threaten competition with the community's own established religious institutions.

The cases of this era differed from the late colonial experience only in that burdensome taxation was added to licensure as a means of repressing speech. Taxation proved a potent weapon. In religion, as in federal-state relations, the power to tax is the power to destroy. See

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[8] Ahlstrom, *supra* note 6, at 285.

[9] Cobb, *supra* note 7, at 113.

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). In *Murdock*, the city authorities used enforcement of a burdensome (though facially nondiscriminatory) tax as the means to drive the Witnesses from their town. In attempting to justify their actions, the authorities seized upon "the fact that the religious literature is distributed with a solicitation of funds." *Id.* at 110. This, they contended, took the Witnesses' activities out from the protection of the First Amendment and into the realm of the commercial. But this Court struck down this "new device for the suppression of religious minorities" (*id.* at 115), holding that the distribution and "sale" of religious materials by evangelists "occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion." *Id.* at 109. And in *Follett* v. *McCormick*, 321 U.S. 573 (1944), the Court extended the principle of *Murdock* to the taxation of nonitinerant preachers in their own home towns.

After *Murdock*, the states acquiesced in a "hands-off" policy toward itinerant evangelists, generally imposing on them only those burdens that were strictly related to actual impacts on the communities in which they preached. For the most part, this meant that the religious activities of evangelists were not taxed, even though some part of their missionary endeavors consisted of the distribution of Bibles, tracts, and other literature for payment. Most states passed specific exemptions in their tax codes; others reached the same result at the administrative level.

Appellee, the State of California, however, sought to impose on appellant, an evangelistic ministry headquartered in Louisiana, liability for sales or use taxes on religious materials distributed to adherents within the State. Although appellant distributes religious materials to adherents in all 50 states, California is the only state to

assert jurisdiction to tax these "sales."[10] Imposition of sales and use tax liability in this case violates appellant's constitutional rights in two fundamental ways.

I. First, appellee has asserted authority to impose use tax collection liability against appellant, which had no regular or continuous presence in California and owned no property there, on the basis of appellant's occasional evangelistic crusades in the State. This violates the Commerce and Due Process Clauses, as interpreted in *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967). Moreover, since the amount of the use tax liability is unrelated to the size or frequency of the crusades, this has the effect of imposing a flat penalty on religious speech, association, and worship, in plain violation of the First Amendment. We contend that "nexus" for purposes of use tax collection liability must be based on something other than meetings and activities of a religious and noncommercial nature. This point, which involves straightforward application of current Supreme Court precedent, is dispositive of 88% of appellant's alleged tax liability.

II. Second, both sales and use taxes at issue in this case are imposed directly on religious activity: the distribution of Bibles, religious tapes and pamphlets, and religious music by a religious body for the purpose of advancing its religious teaching. Under *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), and *Follett* v. *McCormick*, 321 U.S. 573 (1944), as well as more general principles of the Religion Clauses, such taxes are unconstitutional. In *Follett*, the Court held that "[t]he exaction of a tax as a

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[10] One other state (Louisiana) has begun the audit process and presumably will impose tax liability if the decision below is affirmed, and others likely will follow suit. While expressly preserving a claim of constitutional immunity, appellant has consented to payment of sales tax to East Baton Rouge parish on items sold at its bookstore there, rather than litigate through the appellate courts over the small sums involved.

condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint." 321 U.S. at 577. In *Texas Monthly, Inc.* v. *Bullock*, 109 S. Ct. 890 (1989), however, a three-Justice plurality cast doubt on the continued vitality of *Murdock* and *Follett*. It is necessary, therefore, to reassess the principle of *Murdock* and *Follett* in light of current interpretation of the Religion Clauses. We contend that to require a religious body to pay tax on the distribution of religious materials to its adherents would violate the First Amendment, and thus that the principle of *Murdock* and *Follett* should be reaffirmed.

Our argument in support of this proposition will be divided into four parts. First, immunity of religious transactions between a religious body and its adherents from tax is an integral part of this nation's separation of church and state. While many taxes that affect religious organizations are permissible, the dissemination of religious doctrine is constitutionally protected; it may no more be taxed by the state than it may be subsidized by the state. Second, imposition of a tax on the dissemination of religious doctrine is a clear burden on the free exercise of religion, and is not outweighed by any compelling governmental purpose. In this respect, the immunity of religious bodies from tax on activities relating to worship and evangelism must be distinguished from allowing individuals to deduct the cost of their religious adherence from their income tax. The latter can be seen as a form of subsidy, while the former simply avoids imposing a burden.

Third, the administrative burden of a sales and use tax is inhibiting (if not prohibitory), and the subjective nature of determinations that must be made under the sales and use tax law creates the potential for an excessive entanglement between religious and governmental authorities. Fourth, the Establishment Clause concerns that evidently underlay the *Texas Monthly* plurality's decision to reconsider the wider implications of *Murdock* and

Follett do not, upon careful analysis, require abandonment of those long-standing precedents. Rather, *Murdock* and *Follett* fit comfortably within the doctrinal structure of both the Free Exercise and the Establishment Clauses.

ARGUMENT

I. The "Nexus" Between a Distributor of Religious Materials and the Taxing State May Not Be Based On Occasional Meetings and Activities of a Noncommercial, Religious Nature

Under the Commerce and Due Process Clauses, a state may not impose use tax collection liability on an out-of-state distributor unless that distributor has a sufficient "nexus" to the state. *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 554 (1977); *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967). In this case, the Board of Equalization has asserted jurisdiction to tax on the basis of 23 evangelistic crusades appellant conducted in the State during 1974-81.[11] These crusades lasted from one to three days (one crusade lasted six days), and consisted of preaching, singing, prayer, and other religious speech, along with incidental "sales" of sermon tapes, Bibles, religious literature, and religious music. Only about 12% of the sales and use tax liability at issue in this case stemmed from sales at these crusades. The remainder was assessed on the distribution of religious materials from appellant's headquarters in Louisiana to adherents in California through the mails. For purposes of the argument in this section only, we do not contest the constitutionality of the *sales tax* on the distribution of materials in California during the evangelistic crusades. We do, however, contend that the state may not use the evangelistic crusades as a basis for imposing *use tax*.

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[11] See note 4, *supra*.

Even if appellant's activities were purely commercial, these contacts would be insufficient to establish nexus under the Commerce and Due Process Clauses.[12] Every case in which this Court has found nexus involved some continuous substantial presence, such as sales offices (*National Geographic Society, supra*), stores (*D.H. Holmes Co.* v. *McNamara*, 108 S. Ct. 1619 (1988)), or a permanent sales representative (*Tyler Pipe Industries, Inc.* v. *Washington Dept. of Revenue*, 483 U.S. 232, 249-51 (1987)). This Court has never treated episodic contacts with a State as a sufficient basis for imposing use tax collection liability. See *National Bellas Hess, supra*; *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954). Cf. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 317 (1945) (nexus for *in personam* jurisdiction must be based on "continued and systematic" activities in the state).

Indeed, for most of the period involved in this case, there was no nexus of any sort between appellant and the State of California that might justify imposition of use tax collection liability. During three of the eight years in question – 21 of the 28 tax quarters for which there was evidence – appellant conducted *no* crusades in California. At most, appellant's contacts with the State would justify tax liability for seven quarters out of eight years. More fundamentally, these facts illustrate the difficulties that

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[12] The Superior Court and the Court of Appeal held that appellant was procedurally barred from pursuing constitutional claims other than those arising under the First Amendment, on the ground that they had not been presented in the claim for a refund. J.S. App. A30-A33; Tr. 12-14, 231. However, the State Board of Equalization considered and ruled on the Commerce and Due Process Clause issue (J.S. App. F3-F4; J.A. 21) and appellant raised the issue both before and after trial in the Superior Court (Tr. 6-12, 216-225; Appellant's Post-Trial Memorandum, at 1-14), and again in the brief before the Court of Appeal (at 39-49) and the Petition for Review in the California Supreme Court (at 25-27).

would be created if occasional contacts were treated as a tax nexus. Does one day's presence in the state warrant taxation for the entire quarter? For the tax year? For all time? Only a requirement of a sustained, continuous presence within the state will provide an objective, understandable standard for determining when a state can impose tax liability on an out-of-state party.

Even if the quantity of these contacts were sufficient under the Commerce and Due Process Clauses, however, the First Amendment prohibits the State from treating the conduct of religious services as the predicate for taxation. Appellant's evangelistic crusades are an age-old form of religious speech and worship, highly protected under the First Amendment. This Court's description of the conduct in *Murdock* applies equally to appellant's activity here: "It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting." 319 U.S. at 109. Indeed, the evangelistic crusades *are* revival meetings. It would seem obvious that appellee could not impose a $100,000 "tax" or "fine" on appellant for the "privilege" of conducting these religious services. Yet that is precisely the effect of the use tax collection liability in this case.

If it were not for the crusades, appellant would be free from tax on its distribution of materials through the mails. To impose tax liability for holding evangelistic meetings exacts a penalty on the exercise of rights in plain violation of the Constitution. See *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) (a "fine imposed against appellant for her Saturday worship" would be a "burden upon the free exercise of religion"). If the states are permitted to impose tax liability on account of meetings of this sort, religious organizations that distribute religious materials through the mails will be forced to decide, in each instance, whether it is "worth" the price to conduct

religious services in a new state. The "pressure . . . to forego [the religious] practice is unmistakable." *Id.*[13]

In contrast to the sales tax liability, which is roughly proportional to appellant's crusade "sales" activity, the use tax bears no relation whatsoever to the size or frequency of appellant's crusades in California. The amount of the tax is based on appellant's distribution of religious materials from Louisiana to its adherents in California – approximately $104,000. The use tax liability in this case (even excluding the administrative cost, which is substantial) was *over seven times as large* as the sales tax due on the distribution of materials at the crusades; indeed, the use tax liability comes to almost one half of the total value of those materials, which totalled only $240,560.[14] Use of the crusades as a nexus for the imposition of use tax liability is thus functionally identical to the flat licence fee struck down in *Murdock* (though here the inhibitory impact is on the holding of evangelistic crusades rather than on the distribution of religious literature *per se*).

That appellant conducted some "sales" of religious materials at the crusades, and thereby received some revenue, does not change the analysis. As in *Murdock*, appellant's "sales of religious literature were merely incidental to their primary evangelical mission" (*Texas Monthly*, 109 S. Ct. at 904 n.10). The mere fact that some "sales" took place does not turn the crusades into a

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[13] This further distinguishes the present case from *National Geographic, supra*. In *National Geographic*, the nexus was the operation of two offices for the sale of advertising in a magazine. That was commercial activity. Here, the nexus is the conduct of evangelistic crusades and other religious activity, which is not commercial in nature, but deserving of high constitutional protection. *Murdock*, 319 U.S. at 110.

[14] This might be compared to the numbers in *Murdock*, where cumulative license fees could have cost $45 per month, on average monthly sales with a total value of $65. *Texas Monthly*, 109 S. Ct. at 904 n.10.

commercial enterprise or deprive them of their constitutional protection.

Imposition of use tax collection liability on out-of-state businesses "can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *Freeman* v. *Hewit*, 329 U.S. 249, 253 (1946); see *National Bellas Hess*, 386 U.S. at 756 (citation omitted) ("the 'simple but controlling question is whether the state has given anything for which it can ask return' "). During the crusades, appellant paid the full cost of rental of facilities and the police, fire, insurance, and related services for the crusades; and its adherents and employees paid taxes on the hotel rooms, meals, fuel, transportation, and telephones they used as a result of their attendance. See note 3, *supra*. If anything, states and local jurisdictions profit economically from conventions and similar events; that is why they compete to attract them.[15] Appellant's mail distribution of religious materials itself imposes no costs on the State that would warrant tax liability (*National Bellas Hess*, *supra*). Imposition of use tax liability under the circumstances of this case thus has a profound chilling effect on the First Amendment right to conduct religious meetings, and is unwarranted by the sole permissible purpose of the tax. We contend that to constitute "nexus" for purposes of the Commerce Clause, an out-of-state distributor's activities within the state must be continuous and sustained, and for purposes of the First Amendment must be based on something other than worship services and related activities of a religious and noncommercial nature.

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[15] Moreover, if this Court were to reject our argument for immunity from sales tax (Part II, *infra*), the collection of sales tax on the distribution of materials at the crusades would more than recompense the State for its costs, if any, from appellant's activities. There could be no justification for imposing the additional burden of use tax collection.

II. The First Amendment Prohibits Taxation of the Distribution of Religious Materials By Religious Bodies For the Purpose of Spreading Their Ideas

The lower court held (J.S. App. A10-A11), and it is not disputed, that appellant distributes the religious materials at issue in this case in order to spread the gospel of Jesus Christ as appellant understands it. The only materials at issue are books, pamphlets, tapes, and records with specific doctrinal or worship-related content. As in *Murdock*, "[t]he integrity of this conduct or behavior as a religious practice has not been challenged." 319 U.S. at 109. As in *Murdock*, appellant collects a payment for the religious materials it distributes, wherever possible, to defray the costs of the ministry. But, no less than in *Murdock*, "[o]n this record it plainly cannot be said that [appellant] w[as] engaged in a commercial rather than a religious venture" (*id.* at 111), and the lower court did not attempt to justify imposition of tax liability on that basis. As in *Murdock*, the "selling activities" of appellant are " 'merely incidental and collateral' to their 'main object which was to preach and publicize the doctrines of their [faith].' " *Id.* at 112 (citation omitted).

Whether a state may impose a tax on transactions of a religious nature between an evangelistic ministry and its adherents has become an unsettled question in the wake of this Court's recent decision in *Texas Monthly, Inc.* v. *Bullock*, 109 S. Ct. 890 (1989). In *Texas Monthly*, a three-Justice plurality disavowed what it called "unnecessarily sweeping statements in *Murdock* v. *Pennsylvania* and *Follett* v. *McCormick*" (109 S. Ct. at 903). In those cases, along with *Jones* v. *Opelika*, 319 U.S. 103 (1943), the Court had held that "[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint. For . . . 'the power to tax the exercise of a privilege is the power to control or suppress its enjoyment.' " *Follett*, 321 U.S. at 577, quoting

Murdock, 319 U.S. at 112 (citations omitted).[16] The Court distinguished between commercial and religious distribution of literature, holding that the latter is entitled to exemption. 319 U.S. at 111; see 109 S. Ct. at 904 n.11.[17] In a dissenting opinion adopted by the Court on rehearing in *Jones*, Justice Murphy stated that "[t]he exercise, without commercial motives, of freedom of speech, freedom of the press, or freedom of worship are not proper sources of taxation for general revenue purposes." *Jones* v. *Opelika*, 316 U.S. 584, 620 (1942), adopted by the Court on rehearing, 319 U.S. 103, 104 (1943). Thus, when the distribution of books and other literature is carried on as part of an evangelistic enterprise (rather than as a commercial enterprise) the transaction is not subject to the state's taxing power.

The other six Justices in *Texas Monthly* either dissented or filed concurring opinions on narrower grounds, leaving the continued vitality of *Murdock* and *Follett* to another case. This is that case.

The *Texas Monthly* plurality based its conclusion that application of the tax in that case would not violate the Free Exercise Clause on the fact that "the State has adduced no evidence that the payment of a sales tax by

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[16] The Court also stated that "the 'sale' of religious pamphlets by itinerant evangelists was a form of *preaching*, and that imposing a license or occupation tax on such a preacher was tantamount to exacting 'a tax from him for the privilege of delivering a sermon.' " 109 S. Ct. at 903 (quoting *Murdock*, 319 U.S. at 109, 112, and *Follett*, 321 U.S. at 577) (emphasis in original).

[17] The principle of *Murdock* does not apply to for-profit activities, even when those activities involve First Amendment-protected speech. *Minneapolis Star* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 586-87 n.9 (1983); see *Breard* v. *Alexandria*, 341 U.S. 622 (1951). Thus, the sale of a Bible or other religious book by a commercial bookstore would not be exempt.

subscribers to religious periodicals or purchasers of religious books would offend their religious beliefs or inhibit religious activity." 109 S. Ct. at 901. The lack of evidence is probably attributable to the fact that the only parties to the case were a secular publisher and a government official, and there were no *amici curiae* to explain the impact on religious bodies. Whatever the factual weaknesses in the *Texas Monthly* litigation, the plurality did not disavow the fundamental legal principle of *Murdock* and *Follett*: that even "equal treatment of commercial and religious solicitation" might in some circumstances "result in an unconstitutional imposition on religious activity warranting judicial relief." 109 S. Ct. at 904. Mere facial neutrality does not exhaust the protections of the First Amendment.

Evidence in the record in this case documents that imposition of sales and use tax liability on appellant's evangelistic efforts would impose an "undue burden" (*id.* at 905) and "inhibit religious activity" (*id.* at 901). While free exercise claims must be evaluated on a case-by-case basis, we believe that the facts of this case confirm the wisdom of *Murdock* and *Follett*, and that those well-established precedents should not be disturbed.[18]

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[18] As Justices Blackmun and O'Connor have recently pointed out, the Establishment Clause demands that any exemption, whether statutory or constitutional in origin, must be broad enough to encompass the full range of views on issues of religious import. Thus, exemptions must be extended "not only [to] religious literature distributed by a religious organization but also [to] philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." *Texas Monthly*, 109 S. Ct. at 906 (Blackmun, J., concurring). The constitutional protections for "religion" that we invoke here should be understood in that light. So understood, any immunity for the dissemination of "religious" doctrine will avoid the constitutional defect of the Texas statute identified by the concurring Justices in *Texas Monthly*.

A. The Government May Neither Tax Nor Subsidize the Dissemination of Religious Doctrine

Immunity of religious transactions between a religious body and its adherents from tax is an integral part of the scheme of separation of church and state that evolved in this country in the early years of the republic. "Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference." *Walz* v. *Tax Commission*, 397 U.S. 664, 676-77 (1970).

Worship and the dissemination of religious doctrine are outside the jurisdiction of civil authorities, whether to assist or to burden, whether to aid or to tax. Of course, the separation of church and state is not, and could not be, absolute. Insofar as churches[19] or other religious bodies participate in the secular sphere, performing secular services or engaging in secular transactions, they can (and sometimes must) be treated in much the same way as their secular counterparts, both for the receipt of aid (*e.g.*, *Hunt* v. *McNair*, 413 U.S. 734 (1973)), and for the imposition of burdens (*e.g.*, *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985)). But churches are barred from receiving direct financial assistance from the government for the support of their worship and their dissemination of doctrine. *Bowen* v. *Kendrick*, 108 S. Ct. 2562, 2580-81 (1988); *Grand Rapids School District* v. *Ball*, 473 U.S. 373, 385 (1985). The corollary is that worship and the dissemination of religious doctrine are also immune from taxation. As this Court has observed, "The hazards of churches supporting government are hardly less in

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[19] We use the term "church" here in its broad sense as a religious organization dedicated to worship and the dissemination of religious doctrine. The term is not confined to institutions of the Christian religion or to houses of worship.

their potential than the hazards of government supporting churches." *Walz*, 397 U.S. at 675. The combination of ineligibility for assistance in their dissemination of religious doctrine and immunity from tax on the same achieves a rough neutrality toward religion.

Appellant's activities at issue in this case are purely religious and doctrinal in nature. It is difficult to imagine any activity so close to the core of protected religious autonomy as the dissemination of religious doctrine by a religious body to its adherents. The transactions between appellant and its adherents have no secular impact. They impose no "costs" on the state for which the state might be entitled to be recompensed, and they impart no secular "benefits" to the state for which the state would be entitled to offer subvention. They are purely religious, outside "[the] cognizance of Civil Government." See J. Madison, *Memorial and Remonstrance*, ¶ 8, reprinted at 330 U.S. 63, 68.

We do not contend that the state is barred from all forms of taxation that may affect religious organizations. It is free to tax the income of individuals, whether clergy (*Murdock*, 319 U.S. at 112), or laymen (*United States* v. *Lee*, 455 U.S. 252 (1982)), since individuals in their capacity as citizens or residents are equal participants in the burdens and benefits of public life. It is free to tax transactions involving secular goods, whether purchased by the church (*Covenant Community Church* v. *Lowe*, 698 S.W.2d 339 (Tenn. 1985), *app. dismissed*, 475 U.S. 1078 (1986)) or produced by the church and sold on the market (*Tony & Susan Alamo Foundation* v. *Secretary*, 471 U.S. 290 (1985)).[20] This is the rationale of the unrelated business tax provision of the Internal Revenue Code. 26 U.S.C. 511-513. The state is also free to impose taxes and fees to defray specific and documented costs imposed upon the

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[20] *Alamo Foundation* involved minimum wage regulation of a church's commercial activities, rather than a tax, but the principle would equally apply to a tax.

government by the exercise of First Amendment rights. *Cox* v. *New Hampshire*, 312 U.S. 569, 577 (1941) (upholding fee for the costs of a religious procession through public streets); *Gilfillan* v. *Philadelphia*, 637 F. 2d 924, 933 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981) (requiring church to pay the extraordinary costs entailed by a papal mass on public property). And, of course, the government may employ its taxing power in ways that burden free exercise rights if it has a compelling governmental justification, such as the eradication of racial discrimination in education. *Bob Jones University* v. *United States*, 461 U.S. 574, 604 (1983). But, absent a compelling governmental justification, the limit of the state's power is the essentially religious core of a church's activities – the religious interactions between a religious organization and its adherents. Within this sphere of constitutionally protected activity the state must leave the church alone: autonomous and unmolested. See *Corporation of Presiding Bishop* v. *Amos*, 107 S.Ct. 2862, 2871-72 (1987) (Brennan, J., concurring).

Across a wide spectrum of free exercise issues involving the regulation of religious organizations, the courts have drawn a distinction between the core religious functions of religious organizations – particularly the dissemination of religious doctrine – and more secular aspects of their operations.[21] For example, laws

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[21] Some scholars have identified this principle with the Establishment Clause, noting that intrusive regulation of religious entities can "inhibit religion" in violation of the second part of the *Lemon* test, and cause "excessive entanglement" in violation of the third part. See, *e.g.*, Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347 (1984). Others identify this principle with the Free Exercise Clause. See Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev.

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prohibiting employment discrimination have been applied to such positions in religious organizations as an editorial secretary in a religious publishing house,[22] non-ministerial support staff in a theological seminary,[23] and a secular teacher in a religiously-affiliated college,[24] but cannot be applied to clergy and other church officials responsible for "teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[25] Similarly, labor laws can be applied to nurses, maintenance and storeroom employees, and child care workers in religious agencies,[26] but not to employees responsible

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1373, 1378-88, 1392-94 (1981). This is an instance in which the two Religion Clauses work together in perfect harmony, the one preventing excessive conflict and overlap between governmental and religious authorities, the other giving the widest latitude for the exercise of differing views of corporate religious life.

[22] *EEOC* v. *Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982).

[23] *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1981).

[24] *EEOC* v. *Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

[25] *Rayburn* v. *General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); see *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). Faculty and administrators of a theological seminary (but not support staff) were held exempt in *Southwestern Baptist*, 651 F.2d 283-85.

[26] *St. Elizabeth Community Hospital* v. *NLRB*, 708 F.2d 1436 (9th Cir. 1983) (nurses); *NLRB* v. *St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (maintenance, storeroom, and childcare workers).

for inculcation of religious doctrine – even including lay teachers in parochial schools.[27] States have been permitted to regulate the health, safety, and sanitation of residential children's homes operated by religious organizations,[28] but when the regulation comes to affect the religious atmosphere and training in the home it is unconstitutional.[29] Moreover, while free exercise *requires* that the government refrain from intrusion into the core religious activities of religious organizations, the establishment clause *permits* the government to exempt religious organizations from regulation of secular aspects of their operations where it would be difficult or entangling to disaggregate the religious from the secular.[30] This case involves core religious activity. *Murdock*, 319 U.S. at 108-09.

The same line has been drawn when the issue is taxation. For the most part, it has been drawn by statutes and state constitutions, whose "authors . . . [perceived] the latent dangers inherent in the imposition of . . . taxes." *Walz*, 397 U.S. at 673. Table 5 of Appendix A to this brief is a collection of state provisions protecting

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[27] *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979). *Catholic Bishop* and its progeny were decided as a matter of statutory construction, but the Court reached that construction in order to avoid conflict between the statute and the demands of the First Amendment. *Id.* at 499-501.

[28] *Kansas* v. *Heart Ministries, Inc.*, 227 Kan. 244, 607 P. 2d 1102, *app. dismissed*, 449 U.S. 802 (1980).

[29] *Tabernacle Baptist Church* v. *Conrad*, Civ. No. 79-149 (D. S.C. Oct. 27, 28, 1980) (unpublished opinion), quoted and discussed in Esbeck, *supra* note 21, 41 Wash. & Lee L. Rev. at 412-13.

[30] *Corporation of Presiding Bishop* v. *Amos*, 107 S. Ct. 2862 (1987).

religious activities from sales and use taxes;[31] undoubtedly, other states have reached similar results through administrative action and prosecutorial discretion. Although there are numerous variations, the pattern of legislative activity accords with our analysis here: the closer one comes to the internal, religious functions of worship and the dissemination of doctrine, the more likely it is that states will recognize churches as immune from their taxing power.

Moreover, as *Murdock* and *Follett* indicate, there is a constitutional core that underlies these legislative enactments. The taxing power, no less than the police power, is subject to the constraints of the First Amendment. In the (relatively rare) cases in which state taxing authorities have overstepped the line and asserted taxing jurisdiction over religious activities internal to the church, the state and lower federal courts have not hesitated to invalidate them under the First Amendment.[32] Even in California –

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[31] Congress likewise has a longstanding practice of such exemptions. See, *e.g.*, *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (holding that churches, including church-owned schools, are exempt from unemployment tax); 26 U.S.C. 511, 513 (taxing profits on commercial activities of churches, but not on profits from activities "related to" the religious mission of the church); 19 U.S.C. 1202, Pt. 4, ¶ 850 (exempting religious bodies from customs duties on religious articles); ch. 17, 6 Stat. 116 (1813) (remitting duties paid on the importation of plates from printing Bibles); ch. 91, 6 Stat. 346 (1826) (remitting duties paid on the importation of church vestments, furniture, and paintings); ch. 259, 6 Stat. 600 (1834) (remitting duties paid on the importation of church bells).

[32] See, *e.g.*, *Stajkowski* v. *Carbon County Bd. of Assessment*, 541 A.2d 1384 (Pa. 1988) (invalidating occupation tax as applied to a priest); *State* v. *Van Daalan*, 11 N.W. 2d 523 (S.D. 1943) (striking down sales tax as applied to itinerant evangelists); *International Society for Krishna Consciousness, Inc.* v.

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until this case – the sale of religious materials by an evangelistic ministry was held constitutionally immune from sales tax, in reliance on *Murdock. Institute in Basic Youth Conflicts* v. *State Bd. of Equalization*, 166 Cal. App. 3d 1093, 1106 (1985); see also *Opinion of the Attorney General*, No. 79-524 (Jan. 31, 1980), J.A. 14-15.

There is no compelling justification for redrawing the line between taxable and protected activity. The state should not be permitted to use the exercise of First Amendment rights as an occasion for raising general revenues. *Cox* v. *New Hampshire*, 312 U.S. at 577 (upholding fee on religious parade on the ground that it was "not a revenue tax"). A worshipper could not be taxed for going to church or a preacher for preaching, even if these activities were comprehended within a broadly "neutral" category of taxable activities. And surely, if sermons cannot be taxed, neither can audiotapes of sermons or reprints of sermons. That a religious activity may involve the transfer of money does not remove its constitutional protection. "[T]he mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise,"

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Commonwealth, 610 S.W.2d 910, 912 (Ky. App. 1980) (proselytizing and soliciting, not constituting a commercial "sale," is "protected and privileged by the First Amendment"); *State* v. *Meredith*, 197 S.C. 351, 355, 15 S.E.2d 678, 679 (1941) (construing state statute not to apply to "sale" of religious books and pamphlets when it is "merely incidental to the chief purpose of the defendant, which was the spreading of his religion"); *State* v. *Woodruff*, 135 Fla. 84, 13 So.2d 704 (1943) (same); *People* v. *Barber*, 289 N.Y. 378, 46 N.E.2d 329 (1943) (same); *California* v. *Grace Brethren Church*, No. CV 79-93 MRP (C.D. Cal. Apr. 6, 1981) (unpublished opinion reproduced in Jurisdictional Statement), *remanded on jurisdictional grounds*, 457 U.S. 393 (1982) (imposition of unemployment tax on religious schools violates entanglement principle).

this Court commented in *Murdock*. "If it did, then the passing of the collection plate in church would make the church service a commercial project. . . .[A]n itinerant evangelist, however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him." 319 U.S. at 111.

Our constitutional system of separation between church and state comes down to this: in their core religious functions, religious bodies must be autonomous and independent of the government. They may be neither aided nor penalized, subsidized nor taxed. They must be left alone. The dissemination of religious doctrine by churches and other evangelistic ministries is ineligible for aid by the government, and should be equally immune from taxation.

B. Taxation of the Dissemination of Religious Materials by an Evangelistic Ministry Imposes a Substantial Burden on the Free Exercise of Religion, Without Sufficiently Compelling Justification

This case involves the purported power of the state to tax the religious activities of an evangelistic ministry. It bears emphasis that a tax on religious activity (as distinguished from a refusal to subsidize) is a burden on free exercise, perhaps the quintessential burden. See *Murdock*, 319 U.S. at 108 ("It could hardly be denied that a tax laid specifically on the exercise of [First Amendment] freedoms would be unconstitutional"). A tax on the dissemination of religious doctrine will discourage this form of evangelism relative to other uses of time and resources. It adds a substantial additional cost to evangelistic efforts, and on the margin will prevent some evangelistic activity from taking place. As this Court observed in *Murdock*, "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment. . . .Those who can tax the exercise of this religious practice can make its

exercise so costly as to deprive it of the resources necessary for its maintenance." 319 U.S. at 112.

By contrast, refusal to allow a religious adherent to deduct the cost of obtaining a religious benefit is not a burden on free exercise because it does not make the exercise any more costly than it would be in the absence of government. This case is therefore distinguishable from *Hernandez* v. *Commissioner of Internal Revenue*, Nos. 87-963 & 87-1616 (slip op., June 5, 1989), which involved an individual's attempt to deduct from gross income a payment made to the Church of Scientology for religious services, called "auditing" and "training." The Court observed:

> Any burden imposed on auditing or training . . . derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions. This burden is no different from that imposed by any public tax or fee; indeed, the burden imposed by the denial of the "contribution or gift" deduction would seem to pale by comparison to the overall federal income tax burden on an adherent.

Slip op. 17. The Court's decision in *Hernandez* underscores the distinction between a religious institution's exemption from tax and an individual taxpayer's eligibility for tax deductions from income subject to tax. Institutional immunity from taxation is a form of state noninvolvement with, or separation from, religion. Tax deduction for contributions is a form of indirect subsidy of religious activity, analogous to a "matching grant" from the government.[33]

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[33] For lucid explanations of the economic substance of exemptions and deductions by a noted tax authority, see Bittker, *Churches, Taxes and the Constitution*, 78 Yale L. J. 1285 (1969) (on tax exemptions), and Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 Tax L. Rev. 37 (1972) (on the deductibility of contributions).

Consider a religious adherent who wishes to transfer $100 to a religious body, receiving a spiritual benefit (whether tangible or intangible) in return. Assume that the relevant income tax rate is 10 percent, and the relevant sales or use tax rate is also 10 per cent. The "cost" to the adherent of obtaining the spiritual benefit, independent of any tax consequences, is $100. If the transfer is treated as deductible under Section 170 of the Internal Revenue Code, then the adherent is excused from tax on $100 that he has earned in the workplace, and the "cost" of his obtaining the spiritual benefit, net of taxes, is only $90. On the other hand, if the state imposes a sales, use, or services tax on the transfer, then the adherent must pay $10 in taxes, and the "cost" of obtaining the spiritual benefit is $110. Thus, the difference between *Hernandez* and this case is the difference between disallowing a subsidy and imposing a burden.[34]

Since a tax on the noncommercial distribution of religious materials by a religious organization is a burden on free exercise, it follows that it can be justified only by a compelling governmental purpose. The mere need of a state for additional general revenue is not sufficient. *Cox* v. *New Hampshire*, 312 U.S. at 577; *Jones* v. *Opelika*, 316 U.S. at 620, adopted on rehearing, 319 U.S. at 104. If it were, the states could tax attendance at worship services or

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[34] The difference between tax exemption and eligibility for tax deductible contributions is illustrated graphically by the Internal Revenue Code's provisions on lobbying by charitable organizations. The congressional policy is not to subsidize political lobbying with tax funds. Accordingly, an organization that engages in substantial lobbying is excluded from receipt of tax deductible contributions under Sections 170, 501(c)(3), and 501(h) of the Code. But such an organization (provided it meets the other criteria) remains exempt from taxation on its own income, under Section 501(d). Thus, Congress refuses to subsidize political speech, but also declines to tax it. See *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983).

contributions to the church, as readily as they can tax the dissemination of religious doctrine. States always need revenue, but the Constitution places some sources of revenue beyond their grasp.

In *United States* v. *Lee*, 455 U.S. 252, 260 (1982), this Court stated that there is a "broad public interest in maintaining a sound tax system," noting that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* See *Hernandez*, slip op. 18. The government had a legitimate fear that acceding to the plaintiffs' argument in *Lee* would lead to ever-widening claims for exemption by other taxpayers (such as those who refuse to pay the proportion of tax that goes to war-related activities), since there was "no principled way . . . to distinguish" one such claim from another. 455 U.S. at 260. The State in this case can have no comparable concern. Churches and evangelistic ministries have been immune from sales and use taxes on their dissemination of doctrine since the first passage of those taxes – and from other taxes directly bearing on religious practice for still longer – and there have been no dire effects on "the broad public interest in maintaining a sound tax system." *Id.* at 260. Their immunity from taxes of this sort is based on their autonomous status, not on the vagaries of their doctrine. Actual experience makes the rationale of *Lee* inapplicable to this context.

Moreover, even if a state's need for increased general revenues is compelling in the abstract, imposition of a burden on free exercise is not justified unless "it is the least restrictive means of achieving" that compelling governmental purpose. *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981). The State of California has any number of ways to raise revenue without imposing burdens on the dissemination of religious doctrine. As the California courts recognized – until this case – "[t]he interest of California . . . is the raising of revenue. That interest alone, however, cannot justify a privilege or occupation

tax as a condition of engaging in protected activity if there is 'an alternative means of achieving the same interest without raising concerns under the First Amendment.' " *Institute in Basic Youth Conflicts* v. *State Bd. of Equalization*, 166 Cal. App. 3d 1093, 1106 (1985), quoting *Minneapolis Star* v. *Minnesota Comm'n of Revenue*, 460 U.S. 575, 586 (1983).

It is easy to understand why the State may prefer to tax the itinerant evangelist – ever a popular target – but it is precisely choices of that sort that the First Amendment is designed to protect against.

C. The Administrative Burden of Sales and Use Tax Collection Would Be an Undue Imposition on Appellant's Free Exercise of Religion and Would Entail an Excessive Entanglement Between Religious and Governmental Authorities

With all its state and local variations, sales and use taxes are probably the most complicated and burdensome of all taxes to collect. Imposition of this responsibility on an evangelistic ministry would lead to recurring, intricate, and intrusive interactions between religious and government officials. Such impositions raise problems under both the Free Exercise and the Establishment Clause – Free Exercise because the burden on protected activity is inhibiting (if not prohibitory), and Establishment because it is deeply entangling.

Sales and use taxes are imposed by 46 different states[35] and 6,955 smaller taxing jurisdictions (as of 1988),[36] including cities, counties, school districts, development districts, transit authorities, and overlapping

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[35] See Table 1 in Appendix A to this Brief for a listing of all state sales taxes, with relevant statutory and administrative citations. The number 46 includes the District of Columbia.

[36] Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism* (1989 ed.), Vol I., at 59.

taxing districts of every description. Each of these states and many of the 6,955 other jurisdictions can impose a different percentage of tax,[37] and may define the relevant "sale" in a different fashion.[38] Each of these states and many of the local jurisdictions have their own registration and filing requirements,[39] and their own rules for notifying the purchaser of the tax.[40] In order to comply, appellant would have to identify which taxing jurisdictions each person to whom it distributes religious materials resides in (a fact that will not be immediately apparent just from the address, since local taxing jurisdictions overlap zip code zones), and what the applicable tax laws are for that jurisdiction (J.A. 144, Tr. 141). After determining the requirements of these 7,001 jurisdictions, appellant would then be required to obtain and complete the necessary forms,[41] and would be subject to audits and

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[37] See Table 2 in Appendix A to this Brief for a listing of sales tax rates for each state and for sample local jurisdictions.

[38] See Table 3 in Appendix A to this Brief for a chart of regulations relating to sales and use tax by state, including license requirements (including fees), type of criminal sanctions, legal incidence of tax (on seller or buyer), whether seller is required to pass tax on to buyer, and whether the tax must be separately stated or advertised.

[39] Table 4 in Appendix A to this Brief is a chart of the filing requirements by state.

[40] This presents particularly difficult problems for a nationwide ministry, since advertising – including radio, television, and cable advertising – would have to be specially tailored to each jurisdiction to satisfy different and in some cases mutually inconsistent requirements. Information about these requirements is summarized in the last column of Table 3.

[41] The California form is reproduced at J.A. 174.

audit inquiries.[42] These burdens were documented in detail in trial court for purposes of appeal, by means of an offer of proof (J.A. 207-12). As this Court has observed:

> [I]f the power of [one state] to impose tax burdens upon [a mail order distributor] were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if [one state] can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle [the distributor's] interstate business in a virtual welter of complicated obligations to local jurisdictions. . . .

National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753, 759-60 (1967).

The complexities of collecting sales and use tax for multiple jurisdictions create an enormous burden on a national evangelistic ministry. Appellant's auditor, a C.P.A. with a specialty in tax exempt organizations (with 230 exempt organizations as clients), testified that to comply with the law would require appellant "to hire a staff of programmers and start writing a program to do all of this, a massive expenditure of time and money." (J.A. 169, Tr. 172). Appellant proffered evidence that it would require a total capital outlay of over $2 million for computer software programs alone. J.A. 211. The burden on an organization with an average of $240,000 in annual California "sales" is patent. Moreover, the administrative burden would not be proportional to the volume of sales. Large and small ministries alike would face formidable

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[42] The burden of an audit is far from negligible. The audit in this case took some 2-3 weeks, during which auditors had full access to appellant's records and the cooperation of appellant's auditor.

start-up costs. If the principle of *Murdock* and *Follett* is overruled as applied to state sales and use taxes, small religious organizations with limited financial resources will be effectively excluded from participating in this form of ministry.

This Court predicted in *Walz* that "[e]limination of exemption [in the context of property tax] would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." 397 U.S. at 674. Similar forms of entanglement, and worse, would follow from abrogation of immunity from sales and use taxation. Notwithstanding appellant's cooperation with the authorities, the present controversy has featured on-site inspections of appellant's evangelistic crusades (J.S. App. F3), lengthy on-site audits (which, when multiplied by all the taxing jurisdictions, would become virtually continual), inspection of appellant's books and records, threats of criminal prosecution, and, finally, six layers of administrative and judicial process.[43] This constitutes precisely the sort of entanglement this Court has repeatedly condemned in the context of financial aid. *Aguilar* v. *Felton*, 473 U.S. 402, 413 (1985); *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971). Surely, the constitutional strictures against excessive entanglement, which exist in part to protect religious adherents from government intrusion into internal religious matters (*Aguilar*, 473 U.S. at 410; *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501-04 (1979)) apply no less to efforts to tax the church than they apply to efforts to aid the church.

To be sure, not all administrative interactions between government and a religious body amount to "excessive" entanglement, in violation of the First

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[43] Imagine the effect on a smaller religious ministry whose rights are invaded by the tax authorities.

Amendment. In *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985), for instance, the Court upheld recordkeeping requirements under the Fair Labor Standards Act, as applied to commercial businesses owned by a religious organization. The Court's reasoning, however, supports our position in this case. The Court noted, first, that the recordkeeping requirements applied "only to commercial activities undertaken with a 'business purpose,' and would therefore have no impact on [the Foundation's] own evangelical activities." *Id.* at 305. By contrast, the State in this case seeks to impose its administrative requirements directly on appellant's "evangelical activities" – the dissemination of religious doctrine. We have no quarrel with the State's authority to tax and regulate the secular, commercial activities of the church. It is the religious core that is protected under the First Amendment.

The Court in *Alamo Foundation* also stressed that the recordkeeping requirements in that case were "routine and factual." 471 U.S. at 305. This case, by contrast, involves recurring, subjective, and religion-sensitive determinations about donative intent, subject to government auditing and surveillance. There is no easy, objective way to distinguish among the donations, sales, and mixed transactions between appellant and its adherents; as the auditor testified, there is inevitably a "human ingredient" in determining the intended nature of the transaction (J.A. 171, Tr. 173).[44]

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[44] These distinctions also occur, and can cause entanglement problems, in connection with the individual donor's computation of tax deductions. See *Hernandez*, slip op. 12. But the constitutional problem is far more serious in the context of a tax imposed on the religious institution. The individual's tax return is already subjected to individuated determinations, some of which hinge on the taxpayer's mental state. These conflicts do not create entanglement between the institutions of

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More importantly, the State's administration of sales and use tax is fraught with discretion and uncertainty. Under the State's broad definition of a "sale," taxable transactions within churches, synagogues, and other religious communities are ubiquitous. Roman Catholic churches "sell" votive candles for ceremonial purposes; Jewish synagogues "sell" tickets for high holy days; Mormon churches "sell" religious undergarments; Sunday school teachers "sell" religious curriculum; religious pamphlets are available for "sale" in most church foyers or narthexes; many churches periodically "sell" Bibles, prayer books, or hymnbooks; churches often collect "suggested donations" for attendance at performances of sacred music; religious groups often "charge" for meals at fellowship gatherings. All of these "sales" are for the purpose of disseminating religious doctrine or practicing the faith. But it is not likely – it would be neither cost-effective nor politically prudent – for the states to interpose themselves in each of these transactions to insist upon collection of the tax. Far more likely is that the states will look the other way for the vast bulk of these religious "sales," and come down hard on those religious organizations that are large enough, unpopular enough, out-of-state enough, that the political costs of collection are less than the gains.

The problem is especially acute because sales and use tax procedures and liability are often so complicated that they must be resolved through negotiation and estimation. Indeed, appellee's district administrator in charge of this case admitted that the Board of Equalization has a "practice" – "totally at the discretion of the Board" – of "work[ing] with taxpayers" to avoid the "burdensome

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church and state. But the administration of the sales and use tax system, if upheld by this Court, would lead to an unprecedented level of interaction between religious bodies and the agents of the government.

record-keeping and accounting practices" that are required by the letter of the statutes and regulations. J.A. 176-77, Tr. 212-13. The record in this case shows that the amounts owing to appellee could not be determined with precision and that appellant's auditor had to reach an agreement with the state on estimated liability. J.A. 148-49, Tr. 153-154. Where negotiation between church and state is required, the possibility of arbitrariness and selectivity, as well as entangling conflict, is introduced. See *Aguilar* v. *Felton*, 473 U.S. at 413 (when "[a]dministrative personnel of the public and parochial school systems must work together in resolving matters related to" a governmental program, this constitutes a threat of excessive entanglement). Contacts between church and state must be kept "straightforward and susceptible to . . . routinization," *Committee for Public Education* v. *Regan*, 444 U.S. 646, 660 (1980), not open-ended, subjective, and contestable.

The record in this case also shows that agents of the state first threatened criminal prosecution for appellant's refusal to register its evangelistic crusades with the state (J.S. App. E1-E2), then informally waived this demand and with it the threat (Tr. 11). Again, this illustrates the vulnerability of religious organizations to the ad hoc decisions of agents of the state. As this Court has observed, "[t]he threat of sanctions may deter the[] exercise [of First Amendment freedoms] almost as potently as the actual application of sanctions." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). Discretion and legal uncertainty are the handmaidens of arbitariness and selectivity. Cf. *City of Lakewood* v. *Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988) (an ordinance giving government officials unbridled discretion over First Amendment protected activity held unconstitutional even without specific evidence of abuse).

These considerations distinguish this case from *Texas Monthly*, as well as from *Alamo Foundation*. In *Texas Monthly*, the "state's interest in uniform application" of

its tax laws supported imposition of sales tax on religious magazines (109 S. Ct. 905). In this context, it is virtually impossible for the state to achieve "uniform application" of its sales and use taxes, as applied to all "sales" of religious materials by religious bodies to their adherents. One of the disturbing features of the state taxing power struck down in *Murdock* was the way in which it could be deployed against unpopular itinerants with no political base in the community. If the principle of *Murdock* is overruled, there will be no practicable way to ensure that the taxing power is exerted uniformly, and no practicable defense against its abuse. The interaction between church and state, far from being "routine and factual" (*Alamo Foundation*, 471 U.S. at 305), would be "comprehensive, discriminating, and continuing." *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971).

To be sure, either course – taxation or immunity – necessarily entails some degree of entanglement. But immunity from tax is the less entangling alternative. *Walz*, 397 U.S. at 674-75. The degree of entanglement can be analyzed in terms of the nature of both the *determinations* that must be made and the *procedural interactions* that are involved.

The decision whether a ministry's "sales" are immune from taxation entails two key determinations: Is the organization religious? Are the materials in question religious? Such determinations have been approved or even required by this Court in the context of many governmental programs. See *Bowen* v. *Kendrick*, 108 S. Ct. 2562 (1988) (under Adolescent Family Life Act, Secretary of HHS must determine whether potential grantees are "pervasively sectarian"); *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973) (under programs to aid higher education, state officials must determine whether potential beneficiaries are pervasively sectarian); *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (state unemployment compensation commission must determine whether worker's reasons for discharge were "religious"). The distinction

between "religious" and other organizations is made every day by state and federal tax authorities, since their treatment for purposes of property, gift, inheritance, and income tax, as well as filing and audit requirements, hinges on the distinction. There is nothing about sales and use taxes that makes the distinction here any more problematic than it is elsewhere.

The other determination that must be made for purposes of immunity is whether the materials "sold" have the purpose of spreading religious doctrine. This determination, too, is frequently necessary and has been approved and even required by this Court. See *Kendrick*, 108 S. Ct. at 2581 (Secretary of HHS must determine whether materials used in the program "have an explicitly religious content or are designed to inculcate the views of a particular religious faith"); *Lemon*, 403 U.S. at 617 (review of textbooks for religious content is required, though review of a teacher's conduct would be excessively entangling); *Board of Education* v. *Allen*, 392 U.S. 236 (1968) (state must examine textbooks to determine whether they have religious content).

By contrast, sales and use taxation on the distribution of religious literature would require numerous difficult and intrusive examinations of the organization's operations. To take a basic example, how is the state to determine what is the "price" of a religious tape or pamphlet when it is sometimes offered free, sometimes sent in thanks for an unspecified donation (or a donation far in excess of its cost), and offered for different "prices" at different times?[45] Must state agents monitor appellant's religious broadcasts to listen to the "terms of sale" at different times? Must they attend the religious services at which these things are announced? Must they read appellant's magazine, "The Evangelist"? Will they interrogate

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[45] This was not a problem in *Hernandez*, since the charge for "auditing" and "training" sessions was fixed and unalterable. See slip op. 10.

church officials responsible for setting price or determining when materials should be given away? Or will they attempt to set a "market value" on religious materials whose value to the "purchasers" is spiritual? Or will they attempt to determine appellant's "costs" of "production"? And if so, how will they "value" and allocate volunteer time, "overhead expenses" devoted to worship, prayer, or spiritual counseling, or the cost of "publicity," *i.e.*, evangelism?

The procedural interactions needed for recognition of immunity are also far less entangling than for imposition of tax. This Court has recognized that "one-time, single-purpose" interactions between church and state pose less serious entanglement problems than "continuing financial relationships or dependencies, . . . annual audits, and . . . government analysis of an institution's expenditures." *Tilton* v. *Richardson*, 403 U.S. 672, 688 (1971); *Roemer v. Bd. of Public Works*, 426 U.S. 736, 763 (1976) (plurality); see *Kendrick*, 108 S. Ct. at 2596 (Blackmun, J., dissenting). The immunity determination can be made once, and unless circumstances change, need not be made again. When a determination of tax immunity has been made, there will be no further contacts between religious and governmental authorities – no forms to file, no questions to answer, no audits to endure, no criminal prosecutions to be threatened. But the administration of the tax, if it is upheld, would involve repeated (considering the number of jurisdictions, virtually continuous) monitoring, investigation, on-site audits, and negotiations.

This Court is presented with a clear choice between deep, intrusive, and continuing entanglement between church and state and "a reasonable and balanced attempt to guard against those dangers" (*Walz*, 397 U.S. at 673). In the years since *Murdock*, the states have wisely refrained from this form of intrusion. We fear that, with fiscal needs appearing ever more pressing, more states will follow appellee's lead and turn to evangelistic activity as a source of revenue. The abrogation of tax immunity

would profoundly alter the "relationship between the government and the religious authority" (*Lemon*, 403 U.S. at 615), from benevolent separation to active entanglement.

D. Immunity From Tax in this Case Would Be Fully Consistent With This Court's Establishment Clause Jurisprudence

The plurality's disquiet in *Texas Monthly* with the wider implications of *Murdock* and *Follett* evidently stems from the perception that an exemption from taxation targeted solely at religious organizations must be viewed as "state sponsorship of religious belief." *Id.* at 900. The plurality equated the tax exemption in *Texas Monthly* with a "subsidy exclusively to religious organizations." *Id.* at 899. So understood, *Murdock* and *Follett* seem to require precisely what the Establishment Clause seems to forbid: a subsidy to religion. We submit, however, that *Murdock* and *Follett* are fully in keeping with this Court's cases under both the Free Exercise and Establishment Clauses, and that the perceived conflict between *Murdock-Follett* and the Establishment Clause is more apparent than real.

Not all tax exemptions are the equivalent of a "subsidy," either in symbolic impact or in economic substance. As Justice Brennan observed in *Walz*, "the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church." 397 U.S. at 691 (citation omitted). It should not be forgotten that the same Virginia statesmen who put an end to subsidies for religion themselves enacted exemptions for churches in the Commonwealth.[46] As discussed above,[47] an immunity from tax on a religious activity

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[46] For an account, see Justice Brennan's concurring opinion in *Walz*, 397 U.S. at 683-85.

[47] See Section II-B, *supra*.

removes a government burden on free exercise, while other tax benefits, such as eligibility for tax deductible contributions, more closely resemble a subsidy.

The only serious claim that the State could make that immunity from sales and use tax liability is a "subsidy" as a matter of economic substance is under circumstances in which the exempt entity receives valuable public services but is not required to pay for them. That might well justify a tax that is reasonably calculated to defray the costs of benefits bestowed on the religious body. But it would be fanciful to suggest that California's sales and use tax is such a tax – especially as applied to an evangelistic ministry headquartered in Louisiana, which makes only brief and occasional forays into the State. See note 3, *supra*. The sales and use tax has no relation whatsoever to the level of benefits bestowed by the State on a religious body.

As this Court has recently observed, "there is no constitutional requirement that the benefits received from a taxing authority *by an ordinary commercial taxpayer* . . . must equal the amount of its tax obligation." *Cotton Petroleum Corp.* v. *New Mexico*, No. 87-1827, slip op. 44 (Apr. 25, 1989) (emphasis added). Ordinary commercial taxpayers ordinarily can protect themselves through the political process. But when taxes are imposed directly on the dissemination of religious doctrine, there must be a closer fit between taxes extracted and benefits conferred, lest the realm of religious action be reserved to those who "have a full purse." *Murdock*, 319 U.S. at 112. As Justice Murphy observed:

> Respondents [the tax authorities] do not show that the instant activities of Jehovah's Witnesses create special problems causing a drain on the municipal coffers, or that these taxes are commensurate with any expenses entailed by the presence of the Witnesses. In the absence of such a showing, I think no tax whatever can be levied on petitioners' activities in distributing their literature or disseminating their ideas. If the guaranties of freedom of speech and

> freedom of the press are to be preserved, municipalities should not be free to raise general revenue by taxes on the circulation of information and opinion in non-commercial causes; other sources can be found, the taxation of which will not choke off ideas.

Jones v. *Opelika*, 316 U.S. at 620, adopted by the Court, 319 U.S. at 104. This is not, therefore, a case about subsidies from California to appellant. It is a case about whether revenue can be exacted by California from appellant.

Second, it is now well established (as it was not at the time of *Murdock* and *Follett*) that the Free Exercise Clause frequently exempts *religious organizations alone* from governmental burdens,[48] just as the Establishment Clause sometimes bars religious organizations alone from governmental benefits.[49] Free exercise exemptions do not entail violation of the Establishment Clause merely because the "benefit" of exemption falls solely to the religious. To be an establishment, the assistance must be of a form that actively induces or encourages – not merely accommodates – religious behavior. *Corporation of Presiding Bishop* v. *Amos*, 107 U.S. at 2868.

Moreover, the legitimacy of free exercise exemptions presupposes that the protected category – "religion" – be defined broadly enough to encompass nontheistic (even atheistic) opinions about "religious" subjects, including "such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." See *Texas*

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[48] *Corporation of Presiding Bishop* v. *Amos*, 107 S. Ct. 2862, 2869 (1987) ("Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packages with benefits to secular entities"); see *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979) (exempting religious schools from Labor Board jurisdiction); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (exempting church schools from unemployment tax).

[49] *E.g.*, *Aguilar* v. *Felton*, 473 U.S. 402 (1985), and cases cited therein.

Monthly, 109 S. Ct. at 906 (Blackmun, J. concurring). Some state statutes that would otherwise be legitimate accommodations of religion are unconstitutional if they incorporate too narrow an understanding of "religion." This was the principal vice of the statute in *Texas Monthly*. The First Amendment does not permit ideological viewpoint discrimination in the guise of a free exercise claim. But when "religion" is appropriately defined, the Free Exercise Clause, by its very language, requires that the special needs of religious organizations and the special threats to religious autonomy be recognized. There is no constitutional requirement that the relations between church and state be no different than the relations between commerce and state. "The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books." *Murdock*, 319 U.S. at 111.

Tax exemptions targeted solely to religious organizations might well be unconstitutional if the effect were to subsidize the church by providing valuable public benefits at the expense of secular taxpayers, and if the tax presented no plausible dangers to the free exercise of religion. In this case, however, there is no danger of subsidy, and there are powerful reasons to believe that application of the California sales and use tax law would violate appellant's First Amendment rights. Under these circumstances, to grant an immunity from sales and use taxes imposed on the preaching of the gospel and the distribution of religious doctrine could not reasonably be deemed to be an establishment of religion.

CONCLUSION

The judgment of the Court of Appeal of the State of California should be reversed.

Respectfully submitted,

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APPENDIX

TABLE 1: STATE STATUTES AND REGULATIONS RELATING TO SALES AND USE TAX

STATE	CODE CITATION	ADMINISTRATIVE REGULATIONS
ALA.	Ala. Code §40-23-1 et seq.	AR T18-011, AR C1-021,
ALASKA	AS 29.45.650 et seq. * note 1	N/A
ARIZ.	ARS §42-1301.1 et seq. R15-5-1502 et seq.	R15-5-209.A et seq.,
ARK.	Ark. Stats §84-1902 et seq.	GR-3 et seq., UT-3 et seq.
CALIF.	Rev. & Tax., §6006 et seq., § 7200 et seq.	18 Cal. Admin Code §1620 et seq. 1501 et seq.
COLO.	CRS §39-26-104 et seq.	1 CCR 201-4,201-5
CONN.	CGS 12-407 et seq.	CAR 12-426-3 et seq.
DEL.	NO SALES & USE TAX	
D.C.	DCC 47-2001 et seq.	9 DCMR 404 et seq.
FLOR.	FS 212 et seq.	Admin Code §12A-1.001 et seq.
GA.	OCGA §48-8-2 et seq.	GR §560-12-1 et seq.
HAWAII	HRS §237-2 et seq.	Tax Regs §§18-237-1 et seq.
IDAHO	IC §63-3609 et seq.	Tax Regs 13,2 et seq.
ILL.	Ill. Rev Stats, ch. 120 et seq., ch. 24,8-11-1, ch 34	UT Reg §150.101
IND.	Ind. Code §6-2.5-1-2 et seq.	Admin Code §2.2-4-35 et seq.
IOWA	IC §422.42 et seq.	730 Admin Code §15.1 et seq.
KAN.	KSA §79-3600 et seq.	Admin Reg 92-19-1 et seq.
KY.	KRS §139.100 et seq.	103 Admin Reg 28:050 et seq.
LA.	Rev Stats La 47:301 et seq.	Sales Tax Regs 47:301 et seq.

STATE	CODE CITATION	ADMINISTRATIVE REGULATIONS
MAINE	36 MRSA §1752 et seq.	08-128 CMR 301.1 et seq.
MD.	Ann Code,Art 81, §324 et seq.	MD Regs .03.06.01 et seq.
MASS.	MGL, ch 62C, 64H & 64I	830 CMR c.62C
MICH.	MCLA 205.51, MSA 7.521	Admin Code R. 205.5 et seq.
MINN.	Minn Stats §297A.01 et seq.	Minn Rule 8130.1500 et seq.
MISS.	MCA 27-65-1 et seq.	Miss Sales & Use Tax Regs 4, 38,41,70
MO.	Mo Rev Stats 144.010.1	12 C.S.R. 10-3.01 et seq.
MONT.	NO SALES & USE TAX	
NEB.	Neb Rev Stats 77-2702 et seq.	Rev Reg 1-001 et seq.
NEV.	Nev Rev Stats, ch 372	Admin Code §372
N.H.	NO SALES & USE TAX	
N.J.	NJS 54:2B-2, 54:32B-3	N.J.A.C. 18:24-7 et seq.
N.M.	NMSA §7-9-3 et seq.	Gross Receipts & Comp. Regs. 3:1 et seq.
N.Y.	Consolid Laws of NY, ch 60 §1101 et seq.	20 NY Code, Rules & Regs 525
N.CAR.	NCGS 105-164 et seq.	17 NCAC 7B.01 et seq., 6 NCAC 7C.01 et seq.
N.DAK.	ND Century Code 57-39.2	NDAC 84-04.1-01 et seq.
OHIO	ORC 5739.01 et seq.	OAC 5703-9-14 et seq.
OK.	68 OS §1350 et seq.	Sales Tax Rules & Regs No. 13-3 et seq.

ORE.	NO SALES & USE TAX	
PENN.	72 Pa.Stats §7201 et seq.	61 Admin .Code §31.1 et seq.
R.ISL.	RI Gen. Laws §44-18-7 et seq.	Sales & Use Tax Regs, 3 et seq.
S.CAR.	SC Code 12-35-100 et seq.	Sales & Use Tax Regs 117-174
S.DAK.	SDCL 10-45-1.1 et seq.	ARSD 64:06:02:81
TENN.	T.C.A. §67-6-101 et seq.	Admin Code §1320-5-1-1.0 et seq.
TEX.	Tex.Tax Code §151.001 et seq.	Tex. Admin. Code tit.34, §3.285 et. seq.
UTAH	UCA §§59-2-1401 et seq., 59-12-101 et seq.	Sales & Use Tax Rules S1 et seq.
VT.	32 V.S.A. §9701 et seq.	Vt. Tax Reg. 1.9701 et seq.
VA.	Va. Code §58.1-602 et seq.	Va. Retail Sales & Use Tax Regs §630-10-01 et seq.
WASH.	Rev. Code 82.03.010 et seq	Admin Code 458-20-101 et seq.
W.VA.	W. Va. Code §11-15-2 et seq.	Admin Regs, Consumer Sales & Use Tax§13.04 et seq.,§33.01 etseq.
WISC.	Wisc. Stats §77.51 et seq.	Admin Code, §11.002 et seq.
WYO.	Wyo. Stats §39-6-402 et seq.	Wyo. Sales Tax Regs §9 et seq. Wyo. Use Tax Regs §3 et seq.

* Note 1: ALASKA does not impose a *State* sales and use tax, but permits *local governments* to do so. See Table 2.

TABLE 2: SALES AND USE TAX RATES BY STATES AND SELECTED LOCAL TAXING JURISDICTIONS

STATE	1 # OF TAXING JURISDICTIONS	2 CITY (COUNTY)	3 STATE TAX	4 COUNTY TAX	5 CITY TAX	6 OTHER TAX
ALA.	390		4.0%			
					2.0%	
		Birmingham (Jefferson)		1.0%		
					3.0	
		Huntsville (Madison)		1.0		
					3.0	
		Mobile		1.5	2.0	
		Montgomery				
ALASKA	101		0.0			
* note 1					0.5	
		Akutan			1.0	
		Shismaref		1.5		
		Ketchican Gtway			2.0	
		Alakanuk			3.0	
		Anderson			4.0	
		Nome		4.0		
		Juneau			5.0	
		Wrangell			6.0	
		Barrow				

ARIZ. * note 2	82		5.0		
		Flagstaff		S:1.0 U:0.0	
		Phoenix		S:1.2 U:1.2	0.5
		Tucson		S:2.0 U:0.0	
		Coolidge [single item over $10K]		1.5	
		[sale under $10 K]		2.0	
		Gila Bend [single inv. over $1200]		1.0	
		[sale under $1200]		2.0	
		Holbrook [portion of single sale over $1000]		1.0	
		[all other sales]		2.0	
		Parker [single item over $2500]		1.0	
		[all other sales]		2.0	
ARK. * note 3	143		4.0		
	Fayetteville		1.0		
		(Washington)	1.0		
		Fort Smith		1.0	
		(Pulaski)	1.0		

STATE	1 # OF TAXING JURISDICTIONS	2 CITY (COUNTY)	3 STATE TAX	4 COUNTY TAX	5 CITY TAX	6 OTHER TAX
CALIF.	447		4.75			
		(Orange)		1.25		
		Los Angeles			1.25	0.5
		(Sacramento)		1.25		
		(San Diego)		1.25		
		San Francisco			1.25	0.5
COLO.	236		3.0			
		Colo. Springs			2.5	
		(El Paso)		1.0		
		Denver			3.5	0.6
		(Jefferson)		0.5		
		Golden			2.0	0.6
		Pueblo			3.5	
CONN.	1		7.5			
					6.0	
D.C.	1					
FLA	11		5.0			

GA.	156		3.0			
		(Fulton)		1.0		1.0
		(Muscogee)		2.0		
		(Bibb)		1.0		
		(Chatham)		1.0		1.0
HAW.	1		4.0			
IDAHO	1		5.0			
ILL.	1,384		5.0			
		Chicago			2.0	
		(Cook)		1.0		1.0
		(Peoria)		1.25		
		(Winnebago)		1.25		
		Rockford			1.0	
		(Sangamon)		1.25		
		Springfield			1.0	
IND.	1		5.0			
IOWA	39		4.0			

STATE	1 # OF TAXING JURISDICTIONS	2 CITY (COUNTY)	3 STATE TAX	4 COUNTY TAX	5 CITY TAX	6 OTHER TAX
KANS.	176		4.0			
		Kansas City			1.0	
		(Wyandotte)		1.0		
		Topeka			1.0	
		(Shawnee)		1.0		
		(Sedgwick)		1.0		
KENT.	1		5.0			
LA.	303		4.0			
		(E.Baton Rouge)	3.0			
		Lafayette			2.0	
		(Lafayette)		1.5		
		Lake Charles			2.0	
		(Calcasieu)		1.5		
		Monroe			2.5	
		(Ouachita)		0.5		
		(Orleans)		5.0		
		Shreveport			2.0	
MAINE	1		5.0			

MD.	1		5.0		
MASS.	1		5.0		
MICH.	1		4.0		
MINN.	4		6.0		
		Duluth		1.0	
		Minneapolis		0.5	
MISS.	1		6.0		
MO.	675		4.225		
		(Jackson)	0.5		
		Independence		1.0	
		Kansas City		1.0	0.5
		St. Louis		1.375	0.5
		Springfield		1.0	
		(Greene)	0.5		
NEB.	26		4.0		
		Lincoln		1.5	
		Omaha		1.5	

STATE	1 # OF TAXING JURISDICTIONS	2 CITY (COUNTY)	3 STATE TAX	4 COUNTY TAX	5 CITY TAX	6 OTHER TAX
NEV.	8		5.75			
		(Clark)		.25		
		(Washoe)		.25		.25
N.J.	1		6.0			
N.MEX.	133		4.75			
		Albuquerque			.25	
		Santa Fe			.625	
N.YORK	84		4.0			
		(Albany)		3.0		
		(Erie)		4.0		
		New York City			4.0	.25
		(Monroe)		3.0		
		(Onondaga)		3.0		
		Yonkers			2.5	.25
		(Westchester)		1.5		
N.CAR.	101		3.0			
		(Forsyth)		2.0		

N.DAK.	5		5.0		
		Bismarck		1.0	
OHIO	89		5.0		
		(Summit)	0.5		
		(Cuyahoga)	1.0		1.0
		(Montgomery)	0.5		0.5
		(Lucas)	1.0		
OKLA.	480		4.0		
		(Cherokee)	1.0		
		Oklahoma City		2.0	
		Okmulgee		3.5	
		Tulsa		3.0	
PENN.	1		6.0		
R.ISL.	1		6.0		
S.CAR.	1		5.0		
S.DAK.	121		4.0		
		Sioux Falls		2.0	
		Pierre		1.0	

STATE	1 # OF TAXING JURISDICTIONS	2 CITY (COUNTY)	3 STATE TAX	4 COUNTY TAX	5 CITY TAX	6 OTHER TAX
TENN.	107		5.5			
		(Hamilton)		1.75		
		(Knox)		1.5		
		(Davidson)		2.25		
TEXAS	1,108		6.0			
		Abilene			1.0	
		Austin			1.0	1.0
		Fort Worth			1.0	.25
		(Lubbock)		0.5		
UTAH	259		5.0938			
		Provo			.91	.25
VER.	1		4.0			
VA.	137		3.5			
		Norfolk			1.0	
		(Arlington)		1.0		

WASH.	318		6.5	
		Seattle		1.6
		Spokane		1.3
W.VA.	1		6.0	
WISC.	19		5.0	
		(Barron)		0.5
WYO.	17		3.0	
		(Laramie)		2.0
		(Natrona)		1.0
TOTAL	7,001			

Notes to accompany Table 2

Sources: Advisory Commission on Intergovernmental Relations, 1 *Significant Features of Fiscal Federalism* (1989), Table 27, pp. 58-59; *ABA Sales & Use Tax Handbook* (D. Young & J. Piper eds. 1988).

Column 1: In *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753, 759, n. 12 (1967) this Court noted that there were over 2,300 taxing jurisdictions in the country at that time with varying rates of sales and use tax. Column 1 indicates the number of local jurisdictions within each State that impose sales and use tax, as well as the total number of jurisdictions (7,001) that currently impose this form of taxation.

Column 2: This column lists a few cities within each state to reflect examples of variations in state and local tax rates, indicated in columns 3-6.

Note 1: Throughout the nation local sales and use tax rates are constantly in flux. For example, a tax specialist writes of the situation in Alaska: "Local rates are often subject to frequent change. No listing of rates should be relied upon. Taxpayers should telephone the specific taxing entity to verify rate." F. Dinces, "Alaska Sales & Use Taxes," in *ABA Sales & Use Tax Handbook* (D. Young & J. Piper eds. 1988) at 2-2. For more precise schedules of the rates of sales and use tax by state and by other local taxing authorities, see the *National Sales Tax Rate Directory* updated on a monthly basis by VERTEX Systems, Inc.

Note 2: Various cities require separate filings in addition to those required at the state level. For example, the major cities in Arizona are not part of the state tax collection program, but administer and collect their own sales and use taxes, set at different rates. "If a business is going to conduct a taxable activity within one of these cities, it must make separate application to the city involved for a Sales Tax license. Additionally, separate city Sales Tax returns must be prepared and filed with these cities." P. Derdenger, "Arizona Sales & Use Taxes," *ABA Sales & Use Tax Handbook* (D. Young & J. Piper eds. 1988) at 3-14. The Table also offers examples of the variation of the rate of taxation *within the same local jurisdiction* in Arizona, depending on to the size of a purchase or single invoice, indicated within brackets. For purposes of complying with the varying local rates and regulations governing sales and use tax, the ZIP code of a buyer is insufficiently precise. Although these postal designations generally do not cross county lines, they are not a reliable indication of the taxing authority because they do not necessarily correspond to the geographical limits of school districts or other taxing entities.

Note 3: The states generally impose a statutory ceiling on the rate that local taxing authorities may charge in sales and use tax. Some reflect this limit not only with a cap on the percentage of the sale, but with a fixed amount of tax on a sale. For example, "the maximum local tax [in Arkansas] is $25 on a 'single transaction,' defined by local ordinance." J. Eads, "Arkansas Sales & Use Tax," *ABA Sales & Use Tax Handbook* (D. Young & J. Piper eds. 1988) at 4-3.

TABLE 3: STATE-BY-STATE VARIATIONS IN PROVISIONS FOR SALES AND USE TAX

STATE	1 LICENSE REQUIRED? (FLAT FEE)	2 CRIM SANC-TIONS?	3 PRIMARY TAX ON SELLER OR BUYER?	4 MUST TAX BE PASSED ON TO BUYER?	5 MUST TAX BE STATED OR ADVERTISED SEPARATELY?
ALABAMA	YES (0)	FEL	SELLER	YES	NO
ALASKA	NO ST TAX	N/A	SELLER	N/A	N/A
ARIZONA	YES ($5)	FEL	SELLER	YES	YES
ARK.	YES (0)	FEL	BUYER	YES * note 1	NO
CALIF.	YES (0)	M$I	SELLER	YES * note 1	YES
COLO.	YES ($2.50)	FEL	BUYER	YES	YES
CONN.	YES ($20)	M$I	BUYER	YES	NO
D.C.	YES (0)	M$I	SELLER	YES	YES
FLORIDA	YES ($5)	M	BUYER	YES	YES

GEORGIA	YES (0)	M$I	BUYER	YES * note 1	YES
HAWAII	YES ($3)	M	SELLER	YES	YES
IDAHO	YES (0)	FEL	BUYER	YES	YES
ILL.	YES (0)	FEL	SELLER	NO * note 2	NO
IND.	YES ($25)	M$I	BUYER	YES	YES
IOWA	YES (0)	FEL	BUYER	YES	YES
KANSAS	YES (0)	M$I	BUYER	YES	NO
KENT.	YES (0)	M$I	SELLER	YES	YES
LA.	YES (0)	M$I	BUYER	YES	YES
MAINE	YES (0)	M$I	BUYER	YES	NO * note 3
MD.	YES ($5)	M$I	BUYER	YES	YES
MASS.	YES ($10)	FEL	BUYER	NO	YES
MICH.	YES ($1)	M$I	SELLER	NO	NO * note 3

STATE	1 LICENSE REQUIRED? (FLAT FEE)	2 CRIM SANC-TIONS?	3 PRIMARY TAX ON SELLER OR BUYER?	4 MUST TAX BE PASSED ON TO BUYER?	5 MUST TAX BE STATED OR ADVERTISED SEPARATELY?
MINN.	YES ($1)	FEL	BUYER	YES	YES
MISS.	YES (0)	M$I	SELLER	YES	NO
MO.	YES (0)	M	SELLER	YES	YES
NEB.	YES ($1)	FEL	BUYER	YES	YES
NEVADA	YES ($2)	M$I	BUYER	YES	YES
N.J.	YES (0)	M$I	BUYER	YES	YES
N.M.	YES (0)	FEL	SELLER	NO	NO
N.Y.	YES (0)	FEL	BUYER	YES	YES
N.CAR.	YES ($5)	M$I	SELLER	YES	YES
N.DAK.	YES (0)	M	BUYER	YES	YES

OHIO	YES ($25)	FEL	BUYER	YES	NO
OKLA.	YES (0)	M$I	BUYER	YES	YES
PENN.	YES (0)	M$I	BUYER	YES	YES
R.ISL.	YES ($5)	FEL	BUYER	YES	NO
S.CAR.	YES ($5up)	M$I	SELLER	YES	YES
S.DAK.	YES (0)	FEL	SELLER	NO	NO
TENN.	YES (0)	FEL	SELLER	YES	YES
TEXAS	YES (0)	M$	BUYER	YES *notes 1,2	YES
UTAH	YES (0)	FEL	BUYER	YES	YES
VERMONT	YES (0)	FEL	BUYER	YES	YES
VA.	YES (0)	M	SELLER	YES	YES
WASH.		M	BUYER		
Sales-Use	YES ($15)			YES	NO
Bus-Occup	YES ($15)			NO	NO

STATE	1 LICENSE REQUIRED? (FLAT FEE)	2 CRIM SANC-TIONS?	3 PRIMARY TAX ON SELLER OR BUYER?	4 MUST TAX BE PASSED ON TO BUYER?	5 MUST TAX BE STATED OR ADVERTISED SEPARATELY?
W. VA.		FEL	BUYER		
Bus-Occup	NO			NO	NO
Consumers	NO			YES	NO
WISC.	YES ($2)	M	SELLER	YES * note 1	YES
WYO.	YES (0)	M$I	BUYER	NO	YES * note 3

Notes to Accompany Table 3

Source for columns 1, 4 & 5: *All States Tax Handbook* Par. 258 (Prentice-Hall 1984).

Source for column 2: Statutes (see Table 1).

Source for column 3: *All States Tax Handbook* Par. 250 (Prentice-Hall 1984).

Column 1: Almost all states require sellers to obtain a license or permit. Many states charge a flat fee for this license. That sum is indicated in parentheses.

Column 2: All states enforce various provisions of the sales and use tax laws, (e.g., collection of tax, accuracy of filing, compliance with audit) with both civil and criminal penalties. Criminal sanctions are indicated by the use of the following symbols: **FEL** = violation of one or more of the sales and use tax provisions can result in a *felony* conviction; **M** = violation of one or more of the sales and use tax provisions cannot result in a felony conviction, but may result in a *misdemeanor* conviction; if the statute specifies the amount of a potential *fine*, that is indicated by the $ symbol; if the statute also specifies the amount of potential *imprisonment*, that is indicated by the letter **I.**

Column 3: The designation of the primary tax (sales or gross receipts) as a tax on the *seller* or the *buyer* is important in determining deductibility of the tax for state income tax purposes.

Column 4: YES = state law prohibits sellers from absorbing tax. Some states allow sellers to include tax in selling price or to "reimburse" themselves after adding tax to sales price; that is reflected by an asterisk, followed by "note 1." Although some states do not require sellers to pass tax on to buyer, they do require sellers to collect use tax from buyer; that is reflected by an asterisk, followed by "note 2".

Column 5: YES = state law prohibits sellers from advertising or holding out that they will absorb tax. Some states add that sellers may not advertise that tax is not considered an element of the price; that is reflected by an asterisk, followed by "note 3".

* **Note 1:** Sellers may reimburse themselves by adding tax to sales price.

* **Note 2:** Sellers must collect use tax, if payable, from buyer.

* **Note 3:** Sellers may not advertise that tax is not considered an element of the price.

TABLE 4: STATE-BY-STATE VARIATIONS IN FILING DEADLINES FOR SALES AND USE TAX

Symbols used in this Table: **20th** = date of month; **M** = month or monthly; **B-M** = bi-monthly (every other month); **Q** = quarter or quarterly; **S-A** = semi-annual (twice a year); **A** = annual; **Sales** = Sales or Gross Receipts tax; **Use** = Use tax; **$** = amount of tax liability/period, unless otherwise noted.

STATE	MONTHLY or BI-MONTHLY DEADLINE (amt of tax triggering due date)	QUARTERLY DEADLINE (amt of tax triggering due date)	ANNUAL OR SEMI-ANNUAL DEADLINE (amt of tax triggering due date)
ALABAMA	*Sales:* M: 20th (if over $25/M)	*Sales:* 20th of Jan, Apr,Jul,Oct (if under $25/M) *Use:* 20th of M after Q (* See note 1 on permission of Dept of Rev)	n/a
ALASKA	Varies acc. to locality	Varies acc. to locality	n/a

STATE	MONTHLY or BI-MONTHLY DEADLINE (amt of tax triggering due date)	QUARTERLY DEADLINE (amt of tax triggering due date)	ANNUAL OR SEMI-ANNUAL DEADLINE (amt of tax triggering due date)
ARIZONA	M: 20th	(if est. annual liability $200-500)	A: (if est. annual liability under $200)
ARKANSAS	M: 20th (if over $5/M)	20th of Jan,Apr,Jul, Oct (if under $5/M) * note 1 permission	n/a
CALIF.	B-M: 24th and 23rd (if over $17,000)	last day of Jan, Apr,July,Oct ** See note 2 on prepayment)	n/a
COLORADO	M: 20th (if over $300/M) * note 1 permission	20th of Jan,Apr, July,Oct (if under $300/M)	n/a
CONN.	M: last day (if ann amt owed is over $4,000)	last day of Jan, Apr,July,Oct	A: seasonal sellers (if under $2,500)

D.C.	M: 20th	n/a	A: Jan 20 (if under $50/M)
FLORIDA	M: 20th	(if quarterly tax under $100) * note 2 prepayment	S-A: (if semi-annual tax under $200)
GEORGIA	M: 20th	20th of Jan,Apr,July, Oct (if 6-month average under $100) * note 1 permission * note 2 prepayment	n/a
HAWAII	M: last day	end of Jan, Apr, July,Oct (if ann. tax over $1,000)	A: Apr 20 (if ann. tax under $1,000)
IDAHO	M: 20th	n/a	n/a
ILLINOIS	M: last day	* note 2 prepayment: Q prepayments due on 7th, 15th, 22nd, & last day of current month (if average over $10,000/M for 4 preceding quarters)	A: Jan 31 (if monthly average under $20)

STATE	MONTHLY or BI-MONTHLY DEADLINE (amt of tax triggering other due date)	QUARTERLY DEADLINE (amt of tax triggering other due date)	ANNUAL OR SEMI-ANNUAL DEADLINE (amt of tax triggering other due date)
INDIANA	M: 30th; (but on 20th if average over $1,000/M for prior yr)	* note 1 ("less frequent" reporting with permission of Dept of Rev)	* note 1 ("less frequent" reporting with permission of Dept of Rev)
IOWA	B-M: 25th & 10th (if over $4,000 for B-M period), then on 15th of month in next Q. U: 20th (if over $1,500/month)	last day of Jan,Apr July,Oct * note 2 prepayment: (if over $500/M in in 1st or 2nd month of Q, tax due by 20th)	A: Jan 31 (if under $120/yr)
KANSAS	M: 25th	Q: 25th (if under $100/M or $1,200/yr) * note 1 permission	A: Jan. 31 (if under $5/M or $60/yr)
KENTUCKY	M: 20th	n/a	n/a

LOUISIANA	M: 20th	Q: 20th (if under $100/M) * note 1 permission	n/a
MAINE	M: 15th	Q: 15th of Jan,Apr, July,Oct (if under $400/yr) * note 1 permission	A: Jan 15 (if under $100/yr); S-A: July & Jan 15 (if between $100-$200/yr)
MARYLAND	M: 20th	n/a	n/a
MASS.	M: 20th (but in 5 business days after 22nd, if over $25,000/yr)	20th of Jan,Apr,July, Oct (if between $101-$1,200/yr)	A: Jan 20 (if under $100/yr)
MICHIGAN	M: 15th	n/a	n/a
MINN.	M: 25th	25th of Jan,Apr,July Oct (if av monthly tax under $250	A: Jan 25 (if average monthly tax under $25)
MISS.	M: 20th	20th of Jan,Apr,July, Oct (if under $100/M) * note 1 permission	n/a

STATE	MONTHLY or BI-MONTHLY DEADLINE (amt of tax triggering other due date)	QUARTERLY DEADLINE (amt of tax triggering other due date)	ANNUAL OR SEMI-ANNUAL DEADLINE (amt of tax triggering other due date)
MISSOURI	M: *Sales:* by 20th of next month (if tax over $250 for 1st or 2nd calendar Q mo) M: *Use:* by 15th of next month (if tax over $250 for 1st or 2nd calendar Q mo)	*Sales:* last day of Jan,Apr,July,Oct *Use:* 15th of Jan,Apr, July,Oct	A: Jan 31 (if quarterly tax under $45)
NEBRASKA	25th	last day of Jan,Apr, July,Oct (if under under $60/Q) * note 1 permission	"some other basis" * note 1 permission
NEVADA	last day	last day of Jan,Apr, July,Oct (if under $10,000 gross taxable sales/mo)	n/a

N.J.	20th (if over $100/M)	20th of Jan,Apr,July Oct (if under $100/M)	n/a
N.MEX.	25th (report, pay monthly by following 25th)	n/a	n/a
NEW YORK	20th (if taxable receipts over $300K in any of 4 preceding Qs)	20th of Mar,June,Sept Dec (if taxable receipts under $300K in all 4 preceding Qs)	n/a
N.CAR.	15th (if over $25/M)	15th (if under $25/M) * note 1 permission	n/a
N.DAK.	22nd (if tax for prior year $332,000.99)	last day of Jan,Apr, July,Oct (if tax for prior year under $332,000.99)	n/a
OHIO	*Sales:* M: 23rd (reported by seller)	*Use:* 15th of Jan, Apr,July,Oct (reported by buyer)	S-A *filing* by 25th of Jan & July, but M *payment* of tax by 23rd of month if under "advance payment authority"

STATE	MONTHLY or BI-MONTHLY DEADLINE (amt of tax triggering other due date)	QUARTERLY DEADLINE (amt of tax triggering other due date)	ANNUAL OR SEMI-ANNUAL DEADLINE (amt of tax triggering other due date)
OKLA.	*Sales:* M: 15th *Use:* M: 20th	n/a	S-A: 15th of Jan, July for "seasonals or transients" (if under $50/mo)
PENN.	*Sales:* M: 20th (if over $600/3rd calendar Q) *Use:* M: 20th	*Sales:* 20th of Jan, 15th of June, 20th of July & Oct (if under $600/3rd calendar Q)	n/a
R.ISLAND	M: 20th	*report* last day of month after Q, but *pay* in 5 days after 22nd of each M; Q *reporting* may be allowed if average under $200 for 6 consec. M	n/a

S.CAR.	*Sales:* M: 20th *Use:* M: 20th (if over $25,000/M for 3 consec. M of previous yr)	*Use:* 20th of Jan,Apr, July,Oct * note 1 permission	*Sales:* A: 25th (if under $1,200/yr)
S.DAK.	B-M: last day after 2M period M: last day (if over $600 in any 2M period)	n/a	n/a
TENN.	M: 20th	20th of Jan,Apr,July, Oct (if av under $180 for 12 consec. M)	n/a
TEXAS	M: 20th	20th after end of Q (if under $500/M or $1,500/calenda. Q)	n/a
UTAH	n/a	30th of Jan,Apr,July Oct	A: June 15 (if over $96,000/yr or $24,000 /Q or if est. tax over $8,000/M)

STATE	MONTHLY or BI-MONTHLY DEADLINE (amt of tax triggering other due date)	QUARTERLY DEADLINE (amt of tax triggering other due date)	ANNUAL OR SEMI-ANNUAL DEADLINE (amt of tax triggering other due date)
VERMONT	M: 30th (Feb 28th)	n/a	n/a
VA.	M: 20th	n/a	n/a
WASH.	M: 25th	n/a	n/a
W.VA.	*Sales:* M: 15th, but Dec due Jan 30	*Sales:* last day of Jan, Apr,July,Oct (if under $50/M) *Use:* 15th of Jan,Apr, July,Oct * note 1 permission	n/a
WISC	M: last day (if over $600/Q)	last day of Jan,Apr, July,Oct	n/a
WYOMING	last day	last day of Jan,Apr, July,Oct (if under $150/M * note 1 permission	n/a

Notes to accompany Table 4

Source: *All States Tax Handbook* Par. 250 (Prentice-Hall 1984).

Columns 1 & 2: In most states there is a presumptive requirement of filing on either a monthly or a quarterly basis. The filing date refers to both sales & use tax, unless otherwise specified for those states having different filing dates for sales tax and for use tax.

Column 3: The timing of the filing deadline is contingent in most states upon the amount of tax liability that a taxpayer owes. A lower amount of tax liability may trigger a different filing date. This Table reflects the complexity of even knowing when to file in most states by including in parentheses the dollar amounts triggering a different filing date.

* **Note 1:** Permission of Department of Revenue may be required for filing on some other date.

** **Note 2:** Several states require prepayment of estimated tax. Some states impose this obligation in a complicated form. For example, California requires: "Prepayments in the second calendar quarter must be 95% of state and local tax liability for first monthly period and 95% of such liability for second monthly period, plus 95% of liability for first 15 days of third monthly period, or 95% of liability for second monthly period, plus 50% of 95% of liability for second monthly period. Same per-

centage requirements apply to second calendar quarter payments that must be made by persons with estimated measure of tax liability averaging $200,000 or more per month ... if certain financial contingencies occur. If liability averages $17,000 or more, 95% prepayment is required in second quarter, 90% in other quarters. In second calendar quarter, first prepayment must be made by 24th day, and second prepayment by 23rd day.... Persons with liability of $17,000 or more must prepay by 24th day following end of first two monthly periods." *All States Tax Handbook*, p. 206 (Prentice-Hall 1984).

TABLE 5: EXEMPTIONS IN STATE CODES FOR SALES BY RELIGIOUS ORGANIZATIONS

STATE	1 EXEMPTION?	2 CONSTITUTIONAL EXEMPTION?	3 SPECIFIC EXEMPTION FOR SALES FUNCTIONALLY RELATED TO RELIG PURPOSES	4 SPECIFIC EXEMPTION FOR SALES NOT NECESSARILY RELATED TO RELIG PURPOSES
ALA.	SPECIFIC (special acts of legis)	YES	YES * note 2	YES
ALASKA	Varies acc. to locality * See note 1	N/A	N/A	N/A
ARIZ.	SPECIFIC	YES	NO	YES * note 5
ARK.	GENERAL	YES	YES * notes 2 & 3	YES
CALIF.	SPECIFIC	YES	YES/NO * note 2	YES * note 5
COLO.	SPECIFIC	YES	YES * note 3	YES * note 5
CONN.	SPECIFIC	YES	YES * note 3	YES

STATE	1 EXEMPTION?	2 CONSTITU-TIONAL EXEMPTION?	3 SPECIFIC EXEMP-TION FOR SALES FUNCTIONALLY RELATED TO RELIG PURPOSES	4 SPECIFIC EXEMPTION FOR SALES NOT NECES-SARILY RELATED TO RELIG PURPOSES
D.C.	SPECIFIC	YES	YES * note 2	YES
FLA.	GENERAL	YES	YES * note 2	NO
GA.	SPECIFIC	YES	YES * note 2	YES * notes 4 & 5
HAW.	SPECIFIC	YES	YES	NO * note 5
IDAHO	SPECIFIC	YES	YES * note 2	YES * notes 4 & 5
ILL.	SPECIFIC	NO	YES * note 3	YES * note 5
IND.	SPECIFIC	NO	NO	YES * note 5
IOWA	GENERAL	YES	YES * note 3	YES * note 5
KAN.	SPECIFIC	NO	YES * note 3	YES * note 5
KENT.	SPECIFIC	YES	NO	YES * notes 4 & 5

LA.	SPECIFIC	NO	YES * note 3	YES * note 5
MAINE	SPECIFIC	YES	YES * notes 2 & 3	YES
MD.	SPECIFIC	NO	YES * note 3	YES * note 5
MASS.	SPECIFIC	YES	YES * notes 2 & 3	YES * note 5
MICH.	SPECIFIC	YES	YES * note 3	YES * notes 4 & 5
MINN.	SPECIFIC	YES	NO	YES * note 5
MISS.	SPECIFIC	YES	YES	YES
MO.	GENERAL	YES	YES	NO
NEB.	GENERAL	YES	YES * note 3	YES * notes 4 & 5
NEV.	SPECIFIC	YES	YES * note 3	YES * notes 4 & 5
N.JER.	GENERAL	YES	YES * note 2	YES * notes 4 & 5
N.MEX.	GENERAL	YES *	YES	NO
N.YORK	GENERAL	YES *	YES *	YES

STATE	1 EXEMPTION?	2 CONSTITU-TIONAL EXEMPTION?	3 SPECIFIC EXEMP-TION FOR SALES FUNCTIONALLY RELATED TO RELIG PURPOSES	4 SPECIFIC EXEMPTION FOR SALES NOT NECES-SARILY RELATED TO RELIG PURPOSES
N.CAR.	SPECIFIC	YES	YES * note 2	YES
N.DAK.	SPECIFIC	YES	YES * note 2	NO
OHIO	SPECIFIC	YES	YES * note 3	YES * notes 4 & 5
OKLA.	GENERAL	YES *	YES *	YES * notes 4 & 5
PENN.	SPECIFIC	YES	YES * note 2	NO
R.ISL.	GENERAL	YES	YES * note 2	YES * notes 4 & 5
S.CAR.	SPECIFIC	YES	YES	YES
S.DAK.	SPECIFIC	YES	YES	NO
TENN.	SPECIFIC	YES	YES * note 2	NO

TEXAS	GENERAL	YES	YES	NO
UTAH	GENERAL	YES	YES	YES
VT.	GENERAL	YES	YES * note 3	YES
VA.	GENERAL	YES *	YES * note 2	YES
WASH.	SPECIFIC	YES	YES * notes 2 & 3	NO
W.VA.	SPECIFIC	NO	NO	YES * note 5
WISC.	SPECIFIC	YES	NO	NO
WYO.	SPECIFIC	YES	NO	YES

Notes to accompany Table 5

Sources for columns 1-4: Statutes (see table 1), and *ABA Sales & Use Tax Handbook* (D. Young & J. Piper eds. 1988). For other examples of varying state exemptions (e.g., food, prescription drugs, consumer electric and gas utilities, and clothing), see Table 25 in Advisory Commission on Intergovernmental Relations, 1 *Significant Features of Fiscal Federalism* 54-55 (1989). This Table does not report any of the variations in exemptions provided under the regulations of local taxing jurisdictions.

Column 1: All states provide some form of exemption for "sales" by religious organizations. Sometimes a state exemption statute includes religious organizations within a broader group of other charitable organizations. Where a state statute provides an exemption for *all "sales"* by religious organizations, that is indicated by the word, **"GENERAL."** Where a state statute provides an exemption for *particular "sales"* by religious organizations in specified categories (consult columns 3 & 4), that is indicated by the word, **"SPECIFIC."**

Column 2: YES = state law provides an express statutory exemption from any sales that the state is prohibited from taxing under the federal or state *constitution*. Since by implication the general includes the specific, this column also includes New Mexico, New York, Oklahoma, and Virginia, which grant a general exemption to religious organizations from **all** sales and use tax liability, but do not have an express statutory provision along the lines of the other states given a **YES** in this column.

Column 3: YES = state law provides an express statutory exemption for "sales" by religious organizations that are *clearly functionally related to the religious purposes* of the organization. See notes 2 & 3. Since by implication the general includes the specific, this column also includes Iowa, New York, Oklahoma, and Vermont, which grant a general exemption to religious organizations from **all** sales and use tax liability, but do not have an express statutory provision along the lines of the other states given a **YES** in this column.

Column 4: YES = state law provides an express statutory exemption on "sales" by religious organizations that may under some circumstances be *related to the religious purposes* of the organization, but that are *not necessarily* so. See notes 4 & 5.

Note 1: An expert on sales and use tax in Alaska writes: "Because of the diversity among the jurisdictions' ordinances, no exemption/deduction can safely be considered to be uniformly applied. Each locality exempts different transactions/items." F. Dinces, "Alaska Sales & Use Taxes," *ABA Sales & Use Tax Handbook* (D. Young & J. Piper eds. 1988) at 2-3.

Note 2: The states indicated by this asterisk provide an express statutory exemption for distribution of sacred scripture, hymnbooks, pamphlets, and other forms of religious literature. The District of Columbia and Massachusetts exempt publications by religious organizations; this Table assumes that those publications are religious in nature, and reports them in column 3. This Table does not reflect all the state court decisions that have held that the constitution requires immunity for religious organizations from sales tax in circumstances similar to this case. California has both a

YES and a NO in this column because another Court of Appeal has ruled that sales tax may not be applied to a religious organization, *Institute in Basic Youth Conflicts v. State Board of Equalization*, 166 Cal. App. 3d 1093 (1985), but the court below has ruled to the contrary.

Note 3: The states indicated by this asterisk provide an express statutory exemption for sales of magazines and newspapers, or sale and consumption of paper & ink, without any specific reference to religious speech. Although tax exemptions are often narrowly construed, religious speech is presumptively included within these exemptions along with nonreligious speech.

Note 4: The states indicated by this asterisk provide an exemption for sales of meals served in nonprofit schools, or from occasional sale of property (e.g., greeting cards, candy) for a small sum (e.g., $5).

Note 5: The states indicated by this asterisk provide an exemption for gross receipts from occasional events such as parish festivals or bazaars, including communal meals, for purpose of fundraising.